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SENATE

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PROCEEDINGS OF THE UNITED STATES SENATE

IN THE

IMPEACHMENT TRIAL OF ALCEE L. HASTINGS, A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

October 23, 1989—Ordered to be printed

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FOREWORD

The printing of this final volume of the Senate's proceedings in the impeachment of Alcee L. Hastings, formerly a United States District Judge for the Southern District of Florida, was authorized by the unanimous consent of the Senate on October 23, 1989. The volume primarily consists of proceedings and materials not printed in the Congressional Record, previous Senate documents, or in the hearings and reports of the Committee on Rules and Administration and of the Impeachment Trial Committee on the Articles Against Judge Hastings. It continues the Senate's practice in prior impeachments of preserving a historical record of the Senate's conduct of impeachments for the information of the public, for the use of the Congress in future impeachments, and for the use of the Congress in evaluating the impeachment process when considering proposals to revise it. The purpose of this foreword is to assist readers of this volume in gaining a full understanding of the Senate's proceedings in the impeachment of Judge Hastings by identifying the other documents, hearings, and reports with which this final volume should be read.

The articles of impeachment against Judge Hastings were exhibited by the Managers on behalf of the House to the Senate on August 9, 1988. The initial proceedings of the Senate in receiving the articles of impeachment from the House and in providing for the issuance of a summons to Judge Hastings, the filing of an answer by him, and the filing of a replication by the House are reprinted at pages 3-10. The articles of impeachment, Judge Hastings' answer, and the replication of the House are reprinted in Senate Document 101-3, 101st Cong., 1st Sess. (1989), together with the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials and constitutional and statutory provisions germane to this impeachment.

On August 9, 1988, the Senate also called upon the Committee on Rules and Administration to report on the authority of the Senate to continue in the next Congress the proceedings on the impeachment of Judge Hastings; the appropriate use, in the impeachment of Judge Hastings, of Senate Impeachment Rule XI on the appointment of committees to receive and report to the Senate evidence in impeachment trials; and any other matter which may assist the Senate in a fair trial of the Hastings impeachment.

The Committee on Rules and Administration submitted its report, Senate Report 100-542, 100th Cong., 2d Sess. (1988), to accompany Senate Resolution 480 of the 100th Congress, which the Senate passed on September 30, 1988. *See* 134 Cong. Rec. S13749-50 (daily ed. Sept. 30, 1988) (text of S. Res. 480 and statements of Senators Byrd and Stevens). Senate Resolution 480 provided that proceedings in the impeachment of Judge Hastings would be continued in the 101st Congress, that the Committee on Rules and Administration should conduct a hearing in the first month of the new Congress on the use of an evidentiary committee, and should file an early report.

The Committee on Rules and Administration held a hearing on January 26, 1989. The committee's hearing record is reprinted in *Impeachment Trial Procedures: Hearing Before the Senate Comm. on Rules and Administration*, Senate Hearing 101-3, 101st Cong., 1st Sess. (1989). On February 2, 1989, the committee filed its report, Senate Report 101-1, 101st Cong., 1st Sess. (1989), to accompany Senate Resolutions 38 and 39 of the 101st Congress. That day the Senate agreed to Senate Resolution 39, which established a schedule for the submission of any motions by Judge Hastings to dismiss the articles of impeachment, and for responses by the House. *See* 135 Cong. Rec. S1162 (daily ed. Feb. 2, 1989).

Judge Hastings filed motions to dismiss Articles I through XV and XVII of the articles of impeachment against him. His motions and supporting memorandum, the responses of the House, and Judge Hastings' reply are reprinted in Senate Document 101-4, 101st Cong., 1st Sess. (1989). The oral argument on March 15, 1989, on the motions to dismiss, together with the record of the Senate's votes denying Judge Hastings' motions on March 16, 1989, are reprinted at pages 13-57 of this final volume.

Immediately after the Senate's disposition of Judge Hastings' motions to dismiss, the Senate considered and agreed to Senate Resolution 38 on the appointment of an Impeachment Trial Committee. That resolution and the Senate's consideration of it are reprinted in Senate Hearing 101-194, pt. 1, 101st Cong., 1st Sess. 1-6 (1989). Part 1 of Senate Hearing 101-194 contains the pretrial proceedings of the Impeachment Trial Committee. Addendum D to the Report of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, Senate Report 101-156, 101st Cong., 1st Sess. 165-72 (1989), describes several aspects of the committee's pretrial proceedings.

The committee heard eighteen days of testimony between July 10 and August 3, 1989. Parts 2A and 2B of Senate Hearing 101-194 contains the testimony received by the committee at the evidentiary hearings. Parts 3A and 3B contain exhibits that were admitted into evidence at the hearings.

Senate Resolution 38 authorized the Impeachment Trial Committee "to report to the Senate a statement of facts that are uncontested and a summary, with appropriate references to the record, of evidence that the parties have introduced on contested issues of fact." To assist the committee in preparing that report, the committee requested the parties to file statements of fact. Part 2C of Senate Hearing 101-194 contains, among other materials, the initial post-trial filings by the parties that were submitted prior to, and in aid of, the committee's report to the Senate of a summary of the evidence. The committee's report to the Senate, Senate Report 101-156, was filed on October 2, 1989.

Before the full Senate the parties had the opportunity to present their cases both in writing and in oral argument. The briefs of the House and Judge Hastings, together with summaries submitted by each party, are reprinted in this final volume at pages 61-620. The final oral argument of the parties on October 18, 1989, is reprinted at pages 625–679, followed by the Senate's votes on October 20, 1989, on the articles of impeachment, at pages 685–704, and the judgment of the Senate, at page 705. Fifteen Senators availed themselves of the opportunity to publish statements on their votes. Their statements are printed in this final volume at pages 709–799.

This final volume also includes, as did the comparable volume for the impeachment proceedings in 1986 against Judge Harry E. Claiborne, materials relating to litigation arising from the impeachment. In a complaint filed in the United States District Court for the District of Columbia on June 1, 1989, Judge Hastings challenged the impeachment proceedings on several grounds including, principally, claims that the Constitution barred an impeachment trial on charges similar to those for which he was acquitted at a prior criminal trial, and that the Constitution barred use of a committee to receive and report evidence to the full Senate. The Senate's resolutions authorizing the Senate Legal Counsel to defend the Senate parties and the Acting Public Printer are reprinted at pages 803–804 and 807–808.

Judge Walter L. Nixon, Jr., of the Southern District of Mississippi, who was the respondent in a second impeachment proceeding in the 101st Congress, intervened in Judge Hastings' case in the district court to challenge the separate proceeding against Judge Nixon. The basis for Judge Nixon's complaint was the Senate's use of a trial committee for his impeachment. As the issues presented by the two judges were briefed in tandem, and decided together in the district court and in the court of appeals, this volume also includes litigation materials relating to Judge Nixon's complaint. Because the legal arguments of the parties were reiterated in briefs filed in the court of appeals, only selected filings in the district court, as well as the July 5, 1989 opinion of the district court dismissing Judge Hastings' and Judge Nixon's complaints, are reprinted at pages 833–918. A more comprehensive collection of the filings of the parties in the court of appeals and the October 18, 1989 judgment and memorandum of that court, as well as other orders of the court of appeals, are reprinted at pages 919–1263. Early in the appellate proceedings Judge Hastings' sought injunctive relief from the Supreme Court. The papers filed there, and the communications from the Court on the denial of Judge Hastings' application, are reprinted at pages 1265–1293.

The Impeachment Trial Committee was also involved in litigation concerning the testimony of William A. Borders, Jr. Over Mr. Borders' objection, the United States District Court for the District of Columbia, entered an order on June 27, 1989 that Mr. Borders could not refuse to testify before the committee on the basis of his privilege against self-incrimination, and that his testimony could not be used against him. The filings of the parties and the orders of the district court and the court of appeals on the question of immunity are reprinted at pages 1295–1487.

After Mr. Borders refused to testify under immunity, the Senate authorized the committee to bring a civil action to enforce its subpoena. The resolution and committee report are reprinted at pages 811–826. The filings of the parties and the August 17 and August 22, 1989 orders of the district court on the enforcement of the committee's subpoena are reprinted at pages 1491–1607. Immediately upon the Senate's conviction of Judge Hastings on October 20, 1989, the committee moved in the district court for, and the district court granted, an order terminating the contempt sanctions against Mr. Borders. The committee's motion and the district court's order on the termination of contempt sanctions are reprinted at pages 1609–1615.

We hope that this final volume on the impeachment of Judge Hastings, together with the record that has been previously published, will contribute to an understanding of the significant issues which the parties and the Senate confronted in these proceedings.

JEFF BINGAMAN,
Chairman,
Impeachment Trial Committee
on the Articles Against Judge Alcee L. Hastings.

ARLEN SPECTER,
Vice Chairman,
Impeachment Trial Committee
on the Articles Against Judge Alcee L. Hastings.

DECEMBER 1989.

PRELIMINARY PROCEEDINGS OF THE UNITED STATES SENATE SITTING AS A COURT OF IMPEACHMENT

ARTICLES OF IMPEACHMENT AGAINST JUDGE ALCEE L. HASTINGS

(EXHIBITED BY THE HOUSE MANAGERS ON AUGUST 9, 1988)

[From the Congressional Record—Senate, August 9, 1988]

The PRESIDING OFFICER. The Secretary of the majority.

The Secretary to the majority, C. Abbott Saffold, announced their presence as follows:

I have the honor to announce the managers on the part of the House of Representatives to conduct proceedings on behalf of the House concerning the impeachment of Alcee L. Hastings, judge of the U.S. District Court of the Southern District of Florida.

The PRESIDING OFFICER. The managers on the part of the House will be received and assigned their seats.

(The Sergeant at Arms escorted the managers to the seats assigned to them in the area in front of the Chair.)

The PRESIDING OFFICER. The Sergeant at Arms will make a proclamation.

The Sergeant at Arms, Henry K. Giugni, made proclamation, as follows:

Hear ye! Hear ye! All persons are commanded to keep silent, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Alcee L. Hastings, judge of the U.S. District for the Southern District of Florida.

The PRESIDING OFFICER. The managers on the part of the House will proceed.

Manager RODINO. Mr. President, the managers on the part of the House of Representatives are here present and ready to present the articles of impeachment which have been preferred by the House of Representatives against Alcee L. Hastings, judge of the U.S. District Court for the Southern District of Florida. The House adopted the following resolution which, with the permission of the Senate, I will read.

House Resolution 511 in the House of Representatives, August 3, 1988:

> *Resolved*, That Peter W. Rodino, Jr., John Conyers, Jr., Don Edwards, John Bryant, Hamilton Fish, Jr., and George W. Gekas, Members of the House of Representatives, are appointed managers to conduct the impeachment trial against Alcee L. Hastings, judge of the United States District Court for the Southern District of Florida.

These managers are instructed to appear before the Senate of the United States and at the bar thereof in the name of the House of Representatives and of all the people of the United States to try the impeachment of Alcee L. Hastings of high crimes and misdemeanors in office and to exhibit to the Senate of the United States

the articles of impeachment against that judge which have been agreed upon by the House of Representatives.

These managers shall demand that the Senate take order for the appearance of Alcee L. Hastings to answer such impeachment and demand his conviction and appropriate judgment thereon.

With the permission of the President and the Senate, I will now read the articles of impeachment.

House Resolution 499 in the House of Representatives, August 3, 1988:

Resolved, That Alcee L. Hastings, a judge of the United States District Court for the Southern District of Florida, be impeached for high crimes and misdemeanors and that the following articles of impeachment be exhibited to the Senate:

Articles of impeachment exhibited by the House of Representatives of the United States of America in the name of itself and all of the people of the United States of America, against Alcee L. Hastings, a judge of the United States District Court for the Southern District of Florida, in maintenance and support of its impeachment against him for high crimes and misdemeanors.

ARTICLE I

From some time in the first half of 1981 and continuing through October 9, 1981, Judge Hastings and William Borders, then a Washington, D.C. attorney, engaged in a corrupt conspiracy to obtain $150,000 from defendants in *United States* v. *Romano,* a case tried before Judge Hastings, in return for the imposition of sentences which would not require incarceration of the defendants.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE II

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that Judge Hastings and William Borders, of Washington, D.C., never made any agreement to solicit a bribe from defendants in *United States* v. *Romano,* a case tried before Judge Hastings.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE III

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that Judge Hastings never agreed with William Borders, of Washington, D.C., to modify the sentences of defendants in *United States* v. *Romano,* a case tried before Judge Hastings, from a term in the Federal penitentiary to probation in return for a bribe from those defendants.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE IV

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that Judge Hastings never agreed with William Borders, of Washington, D.C., in connection with a payment on a bribe, to enter an order returning a substantial amount of property to the defendants in *United States* v. *Romano*, a case tried before Judge Hastings. Judge Hastings had previously ordered that property forfeited.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE V

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that Judge Hastings' appearance at the Fountainebleau Hotel in Miami Beach, Florida, on September 16, 1981, was not part of a plan to demonstrate his participation in a bribery scheme with William Borders of Washington, D.C., concerning *United States* v. *Romano*, a case tried before Judge Hastings, and that Judge Hastings expected to meet Mr. Borders at that place and on that occasion.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE VI

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to his oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that Judge Hastings did not expect William Borders, of Washington, D.C., to appear at Judge Hastings' room in the Sheraton Hotel in Washington, D.C., on September 12, 1981.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE VII

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to his oath, make a false statement which was intended to mislead the trier of fact.

The false statement concerned Judge Hastings' motive for instructing a law clerk, Jeffrey Miller, to prepare an order on October 5, 1981, in *United States* v. *Romano*, a case tried before Judge Hastings, returning a substantial portion of property previously ordered forfeited by Judge Hastings. Judge Hastings stated in substance that he so instructed Mr. Miller primarily because Judge Hastings was concerned that the order would not be completed before Mr. Miller's scheduled departure, when in fact the instruction on October 5, 1981, to prepare such order was in furtherance of a bribery scheme concerning that case.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE VIII

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to his oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that Judge Hastings' October 5, 1981, telephone conversation with William Borders, of Washington, D.C., was in fact about writing letters to solicit assistance for Hemphill Pride of Columbia, South Carolina, when in fact it was a coded conversation in furtherance of a conspiracy with Mr. Borders to solicit a bribe from defendants in *United States* v. *Romano*, a case tried before Judge Hastings.

Wherefore, Judge Alcee L. Hastings, is guilty of an impeachable offense warranting removal from office.

ARTICLE IX

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to his oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that three documents that purported to be drafts of letters to assist Hemphill Pride, of Columbia, South Carolina, had been written by Judge Hastings on October 5, 1981, and were the letters referred to by Judge Hastings in his October 5, 1981, telephone conversation with William Borders, of Washington, D.C.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE X

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath, make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that on May 5, 1981, Judge Hastings talked to Hemphill Pride by placing a telephone call to 803-758-8825 in Columbia, South Carolina.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE XI

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that on August 2, 1981, Judge Hastings talked to Hemphill Pride by placing a telephone call to 803-782-9387 in Columbia, South Carolina.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE XII

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that on September 2, 1981, Judge Hastings talked to Hemphill Pride by placing a telephone call to 803-758-8825 in Columbia, South Carolina,

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE XIII

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that 803-777-7716 was a telephone number at a place where Hemphill Pride could be contacted in July 1981.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE XIV

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that on the afternoon of October 9, 1981, Judge Hastings called his mother and Patricia Williams from his hotel room at the L'Enfant Plaza Hotel in Washington, D.C.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE XV

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact concerning his motives for taking a plane on October 9, 1981, from Baltimore-Washington International Airport rather than from Washington National Airport.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE XVI

From July 15, 1985, to September 15, 1985, Judge Hastings was the supervising judge of a wiretap instituted under chapter 119 of title 18, United States Code (added by title III of the Omnibus Crime Control and Safe Streets Act of 1968). The wiretap was part of certain investigations then being conducted by law enforcement agents of the United States.

As supervising judge, Judge Hastings learned highly confidential information obtained through the wiretap. The documents disclosing this information, presented to Judge Hastings as the supervising judge, were Judge Hastings' sole source of the highly confidential information.

On September 6, 1985, Judge Hastings revealed highly confidential information that he learned as the supervising judge of the wiretap, as follows: On the morning of September 6, 1985, Judge Hastings told Stephen Clark, the Mayor of Dade County, Florida, to stay away from Kevin "Waxy" Gordon, who was "hot" and was using the Mayor's name in Hialeah, Florida.

As a result of this improper disclosure, certain investigations then being conducted by law enforcement agents of the United States were thwarted and ultimately terminated.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE XVII

Judge Hastings, who as a Federal judge is required to enforce and obey the Constitution and laws of the United States, to uphold the integrity of the judiciary, to avoid impropriety and the appearance of impropriety, and to perform the duties of his office impartially, did, through—

(1) a corrupt relationship with William Borders of Washington, D.C.;

(2) repeated false testimony under oath at Judge Hastings' criminal trial;

(3) fabrication of false documents which were submitted as evidence at his criminal trial; and

(4) improper disclosure of confidential information acquired by him as supervisory judge of a wiretap;

undermine confidence in the integrity and impartiality of the judiciary and betray the trust of the people of the United States, thereby bringing disrepute on the Federal courts and the administration of justice by the Federal courts.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

Mr. President, the House of Representatives by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles of accusation or impeachment against the said Alcee L. Hastings, judge of the District Court for the Southern District of Florida, and also of replying to his answers which he shall make unto the articles preferred against him, and of offering proof to the same and every part thereof, and to all and every other article of accusation or impeachment which shall be exhibited by them as the case shall require, do demand that the said Alcee L. Hastings may be put to answer the misdemeanors in office which have been charged against him in the articles which have been exhibited to the Senate, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice. Mr. President, the managers on the part of the House of Representatives, by the adoption of the articles of impeachment which have just been read to the Senate, do now demand that the Senate take order for the appearance of the said Alcee L. Hastings to answer said impeachment and do now demand his conviction, and appropriate judgment thereon.

Mr. BYRD. Mr. President, at this time the oath should be administered in conformance with article I, section 3, clause 6 of the Constitution, which provides in part: "The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation." Therefore, I move that Mr. Thurmond, the senior Senator from South Carolina, be designated to administer the oath to the President pro tempore, the distinguished Senator from Mississippi, Mr. Stennis, who in turn should administer the oath to the next Senator in point of seniority, Mr. Proxmire.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. THURMOND. Mr. President, I will now administer the oath to the President pro tempore of the Senate, Senator John C. Stennis.

Senator Stennis, if you will raise your right hand: You do solemnly swear that in all things appertaining to the trial of the impeachment of Alcee L. Hastings, judge of the U.S. District Court for the Southern District of Florida, now pending, you will do impartial justice according to the Constitution and laws. So help you God?

Mr. STENNIS. I do.

(Mr. SANFORD assumed the chair.)

Mr. STENNIS. Senator Proxmire, you do solemnly swear that in all things appertaining to the trial of the impeachment of Alcee L. Hastings, judge of the U.S. District Court for the Southern District of Florida, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

Mr. PROXMIRE. I do.

(Mr. PROXMIRE assumed the chair.)

Mr. BYRD. Mr. President, the oath shall now be administered by the Presiding Officer to all Senators. If any Senator has cause to be excused from this service, now is the appropriate time to make that known. If there is no Senator who desires to be excused, I move that the Presiding Officer administer the oath to the Senators.

The **Presiding Officer** (Mr. Proxmire). Is there objection? The Chair hears none. It is so ordered.

Senators shall now be sworn: You do solemnly swear that in all things appertaining to the trial of the impeachment of Alcee L. Hastings, judge of the U.S. District Court for the Southern District of Florida, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

Senators. I do.

The **Presiding Officer.** Any Senator who was not in the Senate Chamber at the time the oath was administered to the other Senators will make the fact known to the Chair so that the oath may be administered as soon as possible to the Senator.

Mr. **Byrd.** The Secretary will note the names of the Senators who have been sworn, and will present to them for signing a book which will be the Senate's permanent record of the administration of the oath.

Mr. President, the next step is to issue a summons to Judge Hastings which directs him to answer the articles of impeachment and to abide by and obey the further orders, directions, and judgments of the Senate. The Sergeant at Arms will serve the summons on Judge Hastings. In accordance with prior practice, the managers on the part of the House will have the opportunity to file a replication to the answer. Accordingly, on behalf of myself and the distinguished minority leader, Mr. Dole, I send to the desk a resolution for the issuance of a summons with respect to the articles of impeachment against Alcee L. Hastings, and ask for its immediate consideration.

The **Presiding Officer.** The clerk will report the resolution.

The assistant legislative clerk read as follows:

S. Res. 456

A resolution to provide for issuance of a summons and for related procedures concerning the articles of impeachment against Alcee L. Hastings

Resolved, A summons shall be issued which commands Alcee L. Hastings to file with the Secretary of the Senate an answer to the articles of impeachment no later than September 8, 1988, and thereafter to abide by, obey, and perform such orders, directions, and judgments as the Senate shall make in the premises, according to the Constitution and laws of the United States.

Sec. 2. The Sergeant at Arms is authorized to utilize the services of the Deputy Sergeant at Arms or another employee of the Senate in serving the summons.

Sec. 3. The Secretary shall notify the House of Representatives of the filing of the answer and shall provide a copy of the answer to the House.

Sec. 4. The Managers on the part of the House may file with the Secretary of the Senate a replication no later than September 23, 1988.

Sec. 5. The Secretary shall notify counsel for Alcee L. Hastings of the filing of a replication, and shall provide counsel with a copy.

Sec. 6. The Secretary shall provide the answer and the replication, if any, to the Presiding Officer of the Senate on the first day the Senate is in session after the Secretary receives them, and the Presiding Officer shall cause the answer and replication, if any, to be printed in the Senate Journal and in the Congressional Record. If a timely answer has not been filed the Presiding Officer shall cause a plea of not guilty to be entered.

Sec. 7. The provisions of this resolution shall govern notwithstanding any provisions to the contrary in the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials.

Sec. 8. The Secretary shall notify the House of Representatives of this resolution.

The **Presiding Officer**. The question is on agreeing to the resolution.

The resolution (S. Res. 456) was agreed to.

Mr. **Byrd**. Mr. President, I move to reconsider the vote by which the resolution was agreed to.

Mr. **Dole**. I move to lay that motion on the table.

Mr. **Byrd**. Mr. President, the question whether Judge Alcee L. Hastings engaged in impeachable conduct was the subject of consideration in the judicial branch for 4 years from the time that complaints were filed by several of Judge Hastings' fellow judges in March 1983. The judicial branch concluded its proceedings in March 1987, when Chief Justice William Rehnquist transmitted to the Speaker of the House of Representatives a certification that Judge Hastings had "engaged in conduct which might constitute one or more grounds for impeachment." Following the Chief Justice's certification to the House in March 1987, the House of Representatives studied this matter in subcommittee and full committee, and then voted on the articles of impeachment last week.

It is now the Senate's responsibility to render a verdict on the 17 articles of impeachment that are now before us. In fairness to both the House of Representatives and Judge Hastings, we should not attempt to complete the trial of this impeachment in the few weeks that remain before the adjournment sine die of this Congress.

There is historical precedent for the Senate's carrying an impeachment over from one Congress to the next. This was done in 1933 in the impeachment of Judge Louderback. The question of doing so, however, has never been the subject of a report by a committee to the Senate. In addition to advice on that subject, the Senate would benefit from a recommendation on the appropriate use in this impeachment of an evidentiary committee under Senate Impeachment Rule XI to help prepare for the Senate's taking up of the articles early in the next Congress.

Accordingly, on behalf of myself and the distinguished minority leader, Mr. Dole, I ask unanimous consent that the Committee on Rules and Administration shall report to the Senate by September 23, 1988, on (a) the authority of the Senate to continue in the next Congress proceedings on the impeachment of Judge Alcee L. Hastings; (b) the appropriate use, in the pending impeachment, of Senate Impeachment Rule XI; and (c) any other matter which may assist the Senate in a fair trial of the pending impeachment.

The **Presiding Officer**. Is there objection? The Chair hears none. It is so ordered.

The Senate will take further appropriate order and notify the House of Representatives and counsel for Judge Hastings.

Mr. **Byrd**. Mr. President, I suggest the absence of a quorum.

The **Presiding Officer**. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. **Byrd**. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The **Presiding Officer** (Mr. Sanford). Without objection, it is so ordered.

III

100TH CONGRESS
2D SESSION

S. RES. 456

To provide for issuance of a summons and for related procedures concerning the articles of impeachment against Alcee L. Hastings.

IN THE SENATE OF THE UNITED STATES

AUGUST 9, 1988

Mr. BYRD (for himself and Mr. DOLE) submitted the following resolution; which was considered and agreed to

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RESOLUTION

To provide for issuance of a summons and for related procedures concerning the articles of impeachment against Alcee L. Hastings.

Resolved, That a summons shall be issued which commands Alcee L. Hastings to file with the Secretary of the Senate an answer to the articles of impeachment no later than September 8, 1988, and thereafter to abide by, obey, and perform such orders, directions, and judgments as the Senate shall make in the premises, according to the Constitution and laws of the United States.

SEC. 2. The Sergeant at Arms is authorized to utilize the services of the Deputy Sergeant at Arms or another employee of the Senate in serving the summons.

SEC. 3. The Secretary shall notify the House of Representatives of the filing of the answer and shall provide a copy of the answer to the House.

SEC. 4. The Managers on the part of the House may file with the Secretary of the Senate a replication no later than September 23, 1988.

SEC. 5. The Secretary shall notify counsel for Alcee L. Hastings of the filing of a replication, and shall provide counsel with a copy.

SEC. 6. The Secretary shall provide the answer and the replication, if any, to the Presiding Officer of the Senate on the first day the Senate is in session after the Secretary receives them, and the Presiding Officer shall cause the answer and replication, if any, to be printed in the Senate Journal and in the Congressional Record. If a timely answer has not been filed the Presiding Officer shall cause a plea of not guilty to be entered.

SEC. 7. The provisions of this resolution shall govern notwithstanding any provisions to the contrary in the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials.

SEC. 8. The Secretary shall notify the House of Representatives of this resolution.

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ARGUMENT OF MOTIONS BY JUDGE ALCEE L. HASTINGS TO DISMISS ARTICLES OF IMPEACHMENT

[From the Congressional Record—Senate, March 15, 1989]

The PRESIDENT pro tempore. Under the previous order, the hour of 2:15 p.m. having arrived and a quorum having been established, the Senate will resume its consideration of the articles of impeachment against Judge Alcee L. Hastings.

The majority leader is recognized.

Mr. MITCHELL. Mr. President, I ask unanimous consent that floor privileges during today's impeachment proceedings of Judge Hastings be granted to the following individuals:

MANAGERS OF THE HOUSE OF REPRESENTATIVES

Representative Jack Brooks.
Representative John Bryant.
Representative Mike Synar.
Representative George W. Gekas.
Representative Hamilton Fish, Jr.

HOUSE MANAGERS STAFF

Alan I. Baron, special counsel.
William M. Jones, general counsel.
Daniel M. Freeman, counsel.
Janice E. Cooper, assistant special counsel.
Patricia Wynn, assistant special counsel.
Lori E. Fields, assistant special counsel.
Peter Levinson, associate counsel.
Raymond V. Smietanka, associate counsel.
Jayne Jerkins, counsel.

JUDGE HASTINGS' REPRESENTATIVES

Terence J. Anderson, counsel.
Patricia Williams, counsel.
John W. Karr, attorney.
William G. McLain, attorney.
Ann B. Richardson, attorney.
Robert S. Catz, attorney.

SENATE STAFF

Michael Davidson, Senate legal counsel.
Morgan Frankel, Office of Senate Legal Counsel.
Martha Pope, chief of staff for majority leader.
Charles Kinney, Democratic Policy Committee.
George Carrenbauer, Democratic Policy Committee.
Anita Jensen, Senator Mitchell's staff.

Rebecca Roberts, Office of President pro tempore.
Roy Greenaway, administrative assistant to Senator Cranston.
Sheila Burke, chief of staff for Republican leader.
Robert Dove, Republican leader's staff.
Dennis Shea, Republican leader's staff.
Jim Whittinghill, Republican leader's staff.
Richard Quinn, Republican leader's staff.
Mike Tongour, assistant Republican leader's staff.
Jeff Peck, Judiciary Committee majority.
Thad Strom, Judiciary Committee minority.
Terry Wooten, Judiciary Committee minority.

The PRESIDENT pro tempore. Without objection, it is so ordered. The managers will please make their entry before the proclamation is made. The Sergeant at Arms will make the proclamation.

The Sergeant at Arms, Henry K. Guigni, made the proclamation, as follows:

> Hear ye! hear ye! hear ye! All persons are commanded to keep silence on pain of imprisonment while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives against Alcee Hastings, United States District Judge for the Southern District of Florida.

The PRESIDENT pro tempore. The Chair recognizes the majority leader.

Mr. MITCHELL. Mr. President, on August 9, 1988, the House of Representatives exhibited to the Senate 17 articles of impeachment against U.S. District Judge Alcee L. Hastings of the Southern District of Florida. Judge Hastings was summoned to answer, which he did on September 9, 1988, and the House of Representatives filed a reply to the answer on September 23, 1988.

The Senate decided that it should not attempt to complete consideration of this impeachment in the limited time remaining in the 100th Congress. After receiving a report from the Committee on Rules and Administration that explained the constitutional authority of the Senate to continue an impeachment from one Congress to another, the Senate agreed to Senate Resolution 480 of the 100th Congress to continue this impeachment into the 101st Congress.

The Senate also directed the Rules Committee to hold a hearing early in this Congress on procedures for this impeachment. In connection with that hearing, counsel for Judge Hastings advised the Committee on Rules and Administration that Judge Hastings had legal objections to the articles of impeachment. He requested the opportunity to present motions to the full Senate to dismiss the articles of impeachment. The committee agreed that Judge Hastings should have an opportunity before the full Senate to move to dismiss the articles of impeachment and that this should occur prior to a decision by the Senate on whether to appoint a committee under impeachment rule XI to receive and report evidence on the articles.

The Senate concurred in that recommendation when it agreed, on February 2, 1989, to Senate Resolution 39 on the briefing and argument of Judge Hastings' motions.

In accordance with Senate Resolution 39, Judge Hastings has filed motions to dismiss articles I through XV and article XVII of the articles of impeachment. He has elected not to move to dismiss article XVI.

The motions and the supporting and opposing legal memoranda of the parties have been reprinted in Senate Document 101-4, which is before each Senator.

CERTAIN SENATORS RECUSED FROM PARTICIPATION

Mr. **Mitchell**. Mr. President, there are two preliminary matters before argument on the motion. First, the Senator from Indiana [Mr. Coats]; the Senator from Vermont [Mr. Jeffords]; the Senator from Mississippi [Mr. Lott]; and the Senator from Florida [Mr. Mack] were Members of the House of Representatives during the 100th Congress when the House voted on the articles of impeachment.

If those Senators wish to make a statement about their participation in the Senate phase of this impeachment, this would be an appropriate time to do so.

Mr. Coats addressed the Chair.

The **President** pro tempore. The Chair recognizes the junior Senator from Indiana [Mr. Coats].

Mr. **Coats**. Mr. President, I was a Member of the House of Representatives at the time the articles of impeachment were proffered against Judge Alcee L. Hastings.

I voted in favor of impeachment. After careful consideration of this matter and upon consultation with other Members of the Senate, including others who participated in the House proceedings, because I believe that the judge is entitled to a full and fair hearing in the Senate, and also to avoid any possible conflict of interest, I have concluded that under the circumstances it would be inappropriate for me to participate in the Senate trial and to vote again on matters related to this impeachment.

I, therefore, request that I be recused from sitting as a Member of the Senate court during the impeachment proceedings against Judge Hastings.

The **President** pro tempore. Mr. Coats is excused from further participation in this impeachment for the reasons stated.

Mr. Jeffords addressed the Chair.

The **President** pro tempore. The Chair recognizes the junior Senator from Vermont [Mr. Jeffords].

Mr. **Jeffords**. Mr. President, I also ask unanimous consent to decline from participation in all Senate proceedings on the impeachment trial of Judge Alcee L. Hastings.

Mr. President, as a Member of the House of Representatives last year I considered and eventually voted in favor of the articles of impeachment against Judge Hastings. In order to ensure the fairest possible hearing and to avoid even the appearance of conflict of interest, I would like now to ask that I be recused from the Senate proceedings regarding the impeachment trial of Judge Hastings.

The **President** pro tempore. Mr. Jeffords is excused from further participation in this impeachment for the reasons stated.

Mr. Lott addressed the Chair.

The **President** pro tempore. The Chair recognizes the junior Senator from Mississippi [Mr. Lott].

Mr. Lott. Mr. President, I, too, join my other colleagues who I served with in the House of Representatives in asking that I be given permission to be recused from these proceedings.

I have checked the precedents, and while I feel like there are so many conflicts in the precedents in the past I think it is incumbent upon us to make sure that there is absolutely no appearance of unfairness in any way, and that Judge Hastings be guaranteed a fair trial. To avoid any appearance of conflict of interest I ask unanimous consent that I be recused from participation in this matter.

Mr. President, I rise at this time to seek unanimous consent to be excused from participating in the motion proceedings and the subsequent impeachment trial involving Judge Alcee L. Hastings.

In arriving at this decision, I have weighed a number of factors, including the obligation I have to represent my constituents in the U.S. Senate, the precedents of the Senate, and the question of possible conflicts of interest.

When the people of Mississippi elected me last November to serve in the Senate of the United States, I assumed a responsibility to participate in the deliberations of this body and to vote upon matters that come before it.

But there are also constitutional values at stake here that must be upheld, namely the right of every American to a fair trial.

I have asked myself whether I have done anything which, in some way, might influence the way in which I would look at the evidence in this case. I concluded that I have not taken any action nor had I been personally involved in any activities that might influence my vote in these proceedings. So I feel that I could be a fair judge of the facts.

I also examined Senate precedents concerning the recusal of Senators who were Members of the House when it voted on articles of impeachment. Here, I found the evidence to be mixed.

During the Eighth Congress, in 1804, three former House Members participated in the impeachment trial of Judge John Pickering and, in fact, all voted in favor of his conviction.

During the 73rd Congress, in 1933, three new Senators who had been Members of the House, asked to be excused from the impeachment trial of Judge Harold Louderback. The Senate granted their request.

The question of potential conflict of interest does concern me, however. The House of Representatives, as an institution, is the prosecutor in these proceedings. Even though I did not participate in the House proceedings, I was a Member of the Republican leadership of the House at the time.

Since the Constitution provides for a separation of prosecutorial and judicial functions under our form of government, I have concluded that my participation in these proceedings might convey the appearance of a conflict of interest. Therefore, I do not believe that I should be sitting in judgment with regard to this matter.

While I would like to participate in these proceedings, I feel that I must recuse myself in order to protect the constitutional right of Judge Hastings to a fair trial and to avoid casting on this body even the slightest appearance of a conflict of interest.

Therefore, Mr. President, I now ask unanimous consent that I be excused from participating in the motion proceedings and the subsequent impeachment trial of Judge Alcee L. Hastings.

The PRESIDENT pro tempore. Mr. Lott is excused from further participation in this impeachment for the reasons stated.

Mr. Mack addressed the Chair.

The PRESIDENT pro tempore. The Chair recognizes the junior Senator from Florida [Mr. Mack].

Mr. MACK. Thank you, Mr. President.

Mr. President, I, like my colleagues, was a Member of the 100th Congress, and voted on the impeachment proceedings in the House. While I am not an attorney nor a scholar, I draw the conclusion that my actions in the House were that I was acting in a sense as part of a grand jury; and, that if I had acted as a grand jury I would not have been selected to sit on the jury that was actually hearing the trial.

So, therefore, I ask unanimous consent that I be able to decline from participation in all Senate proceedings with regard to the impeachment of Judge Hastings on the grounds that my participation may be construed as a conflict of interest.

The PRESIDENT pro tempore. Mr. Mack is excused from further participation in the impeachment proceedings for the reasons stated.

The majority leader is recognized.

OATH ADMINISTERED TO NEWLY ELECTED MEMBERS

Mr. MITCHELL. Mr. President, the remaining preliminary matter is to administer the impeachment oath to the newly elected Members of the Senate, and any Member of the Senate who did not take the oath in the 100th Congress.

Article I, section 3, clause 6 of the Constitution provides in part:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation.

The impeachment oath that was taken by Members of the Senate in the last Congress remains in effect. Only two returning Members did not take the oath in the last Congress, and they have been so advised by the Secretary of the Senate.

The PRESIDENT pro tempore. Those Senators who have not taken the oath will now rise, raise their right hands, and be sworn.

Do you solemnly swear that in all things appertaining to the trial of the impeachment of Alcee L. Hastings, Judge of the U.S. Court for the Southern District of Florida, now pending, you will do impartial justice according to the Constitution and laws. So help you God?

SENATORS. I do.

The PRESIDENT pro tempore. The majority leader is recognized.

Mr. MITCHELL. Mr. President, the Secretary will note the names of the Senators who have been sworn and will present to them for signature the book, which is the Senate's permanent records of the taking of the impeachment oath by the Members of this body.

ARGUMENT ON MOTIONS

Mr. MITCHELL. The Senate is now ready to hear arguments on the motions to dismiss.

The impeachment rules provide that motions should be addressed to the Presiding Officer. As we have done in the past, we have provided that counsel may face the full Senate during their presentations. They should remain mindful, nevertheless, that the proceedings are under the direction of the Presiding Officer. On their part, Senators should recall that any questions that they should have pursuant to rule XIX be reduced to writing, and be put by the Presiding Officer.

The managers on behalf of the House of Representatives, Representatives Brooks, Synar, Bryant, Fish, and Gekas, and special counsel to the House, Alan Baron, are present at the managers' table.

The managers on behalf of the House have designated Representative Bryant to be the lead manager. Terence Anderson and Patricia Graham-Williams are counsel for Judge Hastings and are present with him.

The managers have requested to divide argument among them. Judge Hastings has requested to divide his side's argument between himself and his counsel, Terence Anderson. I request unanimous consent that these requests be granted.

The PRESIDENT pro tempore. Is there objection? The Chair hears none. It is so ordered.

Judge Hastings will open the argument in support of the motion.

Mr. PRYOR. Mr. President, can we have order, please. It is difficult to hear.

The PRESIDENT pro tempore. There will be order in the Senate.

Judge HASTINGS. Mr. President, and distinguished Members of the Senate, it is an honor and a privilege, although not a particularly happy occasion, for me to be here. I recognize that this is a body that does not deal with trivial things, and levity often is not brought forward because of the dignity of the proceeding, but I could not help, sitting there and listening to the Senators who recused, thinking that I am the person that was in fact impeached in the 100th, would that I could recuse.

Mr. President and Members of the Senate, I am Alcee Hastings. I am the judge whom the House asks you to convict in these proceedings. I am the man whom the Government asked the jury to convict on the same accusations 6 years ago. I am the judge and the man who has had to endure the burdens of the continuing investigations for the intervening 6 years.

The Government chose the forum in which these accusations were initially tried. I did not. I insisted that they should be first examined by the House and, if proper, the Senate, before any criminal proceedings. The House did not join in that request. The Justice Department argued impeachment was too cumbersome. The courts concurred. I was tried in the forum chosen by my accusers.

Mr. President and distinguished Senators, the Government had 18 months to investigate and gather evidence in support of these accusations. The Government had the resources of the Justice Department, the FBI, and the grand jury to aid it in its task. Two experienced prosecutors, and gentlemanly, I might add, Bob Richter and Reid Weingarten, supervised the case from the outset of the investigation. Those lawyers selected the evidence they thought most likely to persuade the jury of my guilt.

I confronted them and their evidence before the jury, in the forum the Government had chosen. I proclaimed my innocence there, as I had from the outset and as I do now. I have not committed a crime. I was examined and cross-examined for 2 days. The prosecutors claimed, as they had to, that my testimony was false. The court afforded them every opportunity to prove that claim in rebuttal, and they tried. Those prosecutors never claimed the trial was not fair to the Government.

The jury heard all the evidence and argument on both sides of this matter. Patricia Williams who is seated at counsel table, tried this case before a jury. They were attentive. The prosecutors never complained about either the quality of the jurors or of the attention they gave. Those jurors deliberated carefully over a period of 17 hours. They reached a conclusion. All 12 of them agreed that I was not guilty.

I might add, I saw something there that I had never seen in all of the 26 years that I am a lawyer. Each juror spontaneously and unsolicited, stood in that courtroom and uttered the words "not guilty." The judge did not require them to do that. That was a spontaneous gesture. In the words of one, Betty McMillan, "it was not even close." The Government had a case that consisted of "circumstantial evidence that was shaky at best and an investigation that didn't finish." In that juror's view, "There wasn't enough evidence to convict anybody of anything." It was not a question of reasonable doubt: there was "a lot of doubt."

Six years after that verdict, the House claims that those proceedings don't matter. The House concedes that 5 years of postacquittal investigation have produced no new evidence that wasn't available to the prosecutors—no new evidence after more than 5 years of looking. They claim only that the available evidence might have been presented differently to produce a different result.

The House acknowledges that my accusers have had largely unlimited resources to gather and prepare evidence for a second prosecution. The House concedes that the Government has provided me with no funds to gather or preserve evidence for a second defense. I have read that one Senator said that my request for funds was unprecedented. In my view, everything about this matter at this point is unprecedented, and its historical significance is of eminent importance, gathered together in this matter today, I am sure. The House concedes that witnesses I might have called have died. The House concedes records I might have used have been lost or destroyed. Whatever the House's view, it is clear that memories have dimmed or become impaired.

In the House's view, none of this should matter to the Senate. In that view, the House may demand that the Senate devote some 12 weeks to rehearing evidence at a second trial so that it may reexamine issues the jury resolved in my favor.

In that view, the Senate should give neither weight or deference to the verdict of an American jury. In that view, the Senate should not consider whether it is feasible to conduct a second trial that would be fair to me 6 years after the first. In that view, the fact that I am threatened with the permanent loss of my honor and my political rights does not require that the Senate observe the basic requirements of fairness to an accused citizen that are observed in other proceedings.

I wish to add that for those that think that removal from office is remedial and is not punishment, then I am here to suggest to you that in a matter where the President does not even have the power to pardon an individual, it is a total loss to me. It may very well be that an article III judge has a property right, but that is for another day for all of us to consider. In that view, the fact that I am a judge, a member of the least dangerous and most vulnerable branch, is irrelevant. In that view, the Senate need not pause to consider the enhanced protections the framers thought necessary to protect the independence of every judge in deciding whether there should be a second trial in this case.

I am aware of the sophisticated analyses which the judiciary, the House, and some scholars and newspaper editors have presented in support of the views. These were arguments the judiciary and the House were required to advance when they assumed roles as prosecutors seeking a second chance to establish their case.

I am also aware of the more straightforward views of folks I have spoken with—folks who are not trained to think like lawyers, folks who live in the rest of this country—no offense, but the part outside the beltway. From what I have heard, and I have heard a lot, I can report that some of those people know when something just plain isn't fair. They know that, in America, the Government only gets one shot in a criminal prosecution. They know that juries protect citizens from the biases of judges as well as the zeal of prosecutors. They understand the difference between suspicion, accusation, and proof. They know that only the last of those—proof—matter in proceedings that are fair.

Those people know this case is wrong. They may not know how to put their finger on the apt quotation or be able to quote the precise principle.

On this day of the birth of Thomas Jefferson they may not be as mindful as some of us of Madisonian and Hamiltonian principles or that John Jay in the Federalist Papers had things to say that continue to receive time-honored deference in this distinguished Chamber.

These people know the difference between an acquittal and a conviction. They know the difference between fair and unfair. They know the difference between what is right and what is wrong, and they know this case is wrong.

Mr. President and Senators, you do not have to rely only on common sense and human instinct here today, however. My counsel have, I think, demonstrated that the framers also knew the difference between an acquittal and conviction and that they provided for it in our Constitution. I think their briefs also demonstrate that the framers and those who succeeded them had a sophisticated understanding of the requirements of basic fairness and of the importance of the protections granted judges. They knew that those judges would be specially vulnerable, especially so to suspicion and accusation. They sought to protect them from the zeal of even well-meaning prosecutors.

In my view, my counsel's briefs have demonstrated that the course the House has recommended is wrong and should be rejected here. Sound constitutional principle supports the conclusion that the Senate should defer to the jury's acquittal in this case. Sound constitutional principle requires that the Senate consider whether it is feasible, at this late date, to conduct a trial that is fair. I submit that the Senate properly may and should reject the extraordinary burdens that the House seeks to impose upon it as well as upon me. Professor Anderson will develop those points.

I ask respectfully of you, Mr. President and distinguished Senators, that you hear him and that you study the arguments on both sides and that you dismiss these accusations without trial.

Now, I do not and did not ask that you dismiss the remaining charge, the alleged wiretap disclosure. I have said repeatedly, and as a matter of fact it is almost ridiculous that I have to stand here and say, that I did not disclose anything about a wiretap, but I say that unhesitatingly. I am prepared to confront my accusers and their evidence in this forum on that subject. Despite my counsel's views, I believe the new allegations are serious and merit your attention.

But I do respectfully ask that you reject the House's demand that you retry accusations that the jury rejected in 1983.

The jury system, and I need not lecture this distinguished body, is the cornerstone of justice in America, and to tamper with it lightly sends an extraordinarily pernicious and dangerous message.

Thank you so very much, Mr. President, and distinguished Senators.

The **President** pro tempore. Thank you, Judge Hastings.

Counsel for Judge Hastings, Mr. Anderson, will now continue argument in support of the motions to dismiss.

Pursuant to the previous order, Mr. Anderson, you may reserve a portion of your time for rebuttal.

Mr. **Anderson**. Thank you, Mr. President.

With the Chair's indulgence, I would reserve 10 minutes for rebuttal and whatever time may remain after my remarks and after the Senator's questions if any have been addressed.

The **President** pro tempore. The time will be reserved.

Mr. **Anderson**. Thank you.

Mr. President, Members of the Senate, I do not think there is any question that you are dealing with an issue of historic importance. Never before in the history of this Nation or of any nation in the common law world has impeachment been used to reexamine issues that were resolved in favor of the accused by an American jury.

But I would like at the outset to take this beyond theoretical importance. I think the judge is quite correct and I do not think it is disputed that the framers understood and provided for the difference between a conviction and an acquittal.

In the Constitution you have before you in the judgment and impeachments clause, it recognizes an exception to the general principle and it provides that a party convicted in an impeachment shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law.

Now there are ancient maxims that we have applied. They go back to Bacon, but they can be found in the contemporary jurisprudence.

The first is the presence of an exception affirms the applicability of the general rule to cases not excepted.

The second is the presence of one exception by implication excludes the existence of others.

The fact that the framers thought about a prohibition or authorized a second trial after a conviction indicates they understood that in the absence of an exception, no second trial would be permitted.

The fact that they made an expressed exception for cases that resulted in a conviction by implication strongly suggests they did not intend any exception for cases that resulted in an acquittal. And indeed I would ask, Could anyone suggest that the executive might undertake a criminal prosecution and the courts a trial against an accused, an official who had been acquitted on the verdict of this body?

And in that context, the issue is really: Should the Senate of the United States, as a body constitutionally entrusted with the power to try an official, not grant the same deference to that constitutional institution and coordinate branch, the American jury, and defer to an acquittal by an American jury in the same sense it would expect the other branches to defer to an acquittal it had reached?

But there has been a change. It is clear the framers also envisaged that impeachment by the House and trial by the Senate with respect to our judges would invariably precede any attempt by the executive to exercise discretionary powers to attack a judge and to bring him before the court in criminal proceedings.

That clear understanding was shared, it was honored for 150 years. The executive never attempted to criminally prosecute a Federal judge. All complaints were submitted to the House for 150 years.

The House exercised its powers reluctantly and carefully. Some 40-odd inquiries were conducted. Some 12 or 13 resulted in a decison by the House to prosecute.

The Senate also exercised its powers carefully. The trials were conducted before the full Senate, and it is clear they stood as Hamilton had declared unawed and uninfluenced by the fact it was the House of Representatives in the name of the people who brought the charges for indeed there were only five convictions. There were more acquittals by the Senate.

Now what the framers did not envisage and what brings us here today is the fact that there came a day when there were more than 700 Federal judges. There came a day when there were 435 Members of the House of Representatives. There came a day when there were 100 Members of the Senate.

Those Members of the House and the Senate are consumed by the legislative business necessary to manage the affairs of a great nation. They cannot in reality and could not in reality react to the demands of monitoring the conduct of more than 700 judges.

The first step, departure from our shared understanding, was the fact that all three branches acquiesced, beginning in 1937, in a procedure whereby the Justice Department, the executive, could criminally prosecute a Federal judge before any action by the House. Where the courts could assume jurisdiction and try that judge *de facto,* the process was left to the Justice Department and the courts.

Those powers were exercised by the Justice Department sparingly for more than 40 years. It is an honor and a good tradition that there have been so few prosecutions of our Federal judges. They have served us well and that is merely evidence of the fact.

But, unlike the House, the executive did not exercise that power for more than 40 years in a case where it ran a serious risk of acquittal. What brings us here today and gives this issue its historic uniqueness is the fact that Alcee Hastings is the first judge who was ever acquitted. But to set this case in its context and to demonstrate that its practical significance runs well beyond its historic significance, I would like to suggest to you how this case came here and suggest that it will come again unless the Senate honors what I think are the correct principles.

In the first instance, you should recall that there have been three prosecutions of Federal judges since 1980. You should recall that in none of those cases has the executive made its principal charge stick. In Judge Claiborne's case the Government's main claim was that he had solicited and accepted bribes from Joseph Comforte. After one trial, a hung jury leaning toward the defendant, they dropped that charge and had a secret trial on secondary counts, tax evasion.

You should recall that in Judge Nixon's case, now pending before the House, the original charge was that he had accepted property in exchange for being influenced in an official act. The jury acquitted him on that charge. He was convicted on the secondary charge.

Then you have this case. The Government set up a sting operation against a judge who the FBI acknowledges there was no grounds for suspicion. There were certainly grounds for suspicion against William Borders, the attorney. But the FBI acknowledges; nothing against the judge.

In that context the judge decided—the FBI, and Mr. Weingarten, Mr. Richter, and their superiors in the Justice Department—decided to proceed notwithstanding the fact that the one judicial order that had been issued was admittedly a proper and predictable application of the law of the circuit as it then stood. And, given that, with only circumstantial evidence of the judge's involvement, with no one who had heard him, no one who had seen him, only the fact that he was here, there, and his telephone records show that call may have been made, they decided to arrest William Borders at the scene of the payoff.

No prosecutor I have talked to has ever attempted to defend that decision. If you are going after a Federal judge, you let the money run to find out. Had it, had the money, been permitted to go, we might—we would not, today, be here. We would either know decisively that this man is innocent, because no money went to him, or we would know decisively this man is guilty, because we would have direct evidence. But it was the Government who decided to take the chance of arresting Mr. Borders at the scene of the payoff.

Whatever the correct answer or motive of the decision, that is risky policy and especially risky with a Federal judge.

The final factor that bears upon—that makes this case the first is that, with respect to this judge, with the resources of the FBI, the grand jury, the Justice Department, they could find no secondary allegation to impute in any way his established reputation for integrity. It was either this accusation or none.

Now, I submit to you, if there is a Justice Department policy that encourages risky prosecutions of Federal judges, you have to accept the consequences. When you embark on a policy you may get great gains. But you also may suffer the risk of acquittal. I submit the Senate must at least view this case as a case of a kind. There may in the future, and probably will be, acquitted Federal judges on the judiciary.

In order to set the case in context, however, you must also examine what will the response of the judiciary be? Until 1980, the judiciary had no role in the examination of judicial conduct, except in the cases that came before them or except in the cases where they may have chosen to exercise peer pressure.

Since 1980, the Congress has assigned them considerable power to investigate judges. What is going to be the judicial reaction to an acquitted judge? I submit to you in every instance it will be one of distress and embarrassment.

The executive has the power to cast the stain of suspicion on the robes of any man it accuses. The trial of a circumstantial case is, in its nature, one that produces questions that cannot be resolved with certainty, only with finality.

There will always be doubts about a man who has been publicly accused, against whom the resources of the executive have been brought to bear, and who is made to stand before a jury of his peers. They cannot be resolved.

I submit in those circumstances there is an almost overwhelming urge for what I would call the Caesar's wife syndrome. The gown has been stained. The stain cannot be washed out. The only way from the judiciary standpoint to restore the balance is to remove the wife.

I think this case, again, illustrates the problem you will confront in the future. Here you had a clear-cut acquittal. I submit to you, the House of Representatives did not and would not have looked behind that jury verdict if there had not been another means of realigning the political power.

We know in this case that the complaint was invited by the chief justice of Judge Hastings' Circuit, a judge who served with distinction based in Alabama who presided over a court that sat in Atlanta. We know that two judges responded to that invitation and filed the complaint. Neither of those judges have ever served with this man. Neither was a judge of his district.

We know that the judiciary retained one of the most able prosecutors and one of the most experienced impeachment lawyers in the country. John Doar is entitled to all our respect. He is an able lawyer. But they retained him at the outset and you do not retain a John Doar unless you have a view to making a major case.

We know more, however. We know that this is not an inadequate or venal judge. We know that no judge from his district has ever complained. We know the judges of his district who are on his witness list as defense witnesses at his trial. We know that no judge from his district was called by the investigating committee of judges who sat. We know that no judge was called by the subcommittee that conducted the House inquiry.

Indeed, we know that it was the judges of his district who appeared on the list of witnesses Judge Hastings asked that committee to call. And there have been no complaints from the judges, from the lawyers, the senior practitioners who have submitted their causes and argued before this judge. And we know, and it is in the record, it was those senior prosecutors, the former chief prosecutor of the district, senior members of the defense bar, lawyers from all walks who were on this judge's witness list to tell you how he is regarded.

So, you have a circumstance where you have a circumstantial case, a failed prosecution, an embarrassed judiciary, and a unanimous report from the judiciary supported by a carefully crafted record asking the House—recommending to the House that this man be impeached. The political stakes have been altered.

Former Senator Buckley, in his dissenting opinion in one of the Hastings cases versus judicial conference, recognized that I think most clearly and perhaps recognized it with what I would hope would be the sensitivity that the Members of this body would have. It was a political act when the judiciary certified to the House that this man was not a member, a proper member of their club.

It would have been exceedingly difficult for the House in the face of that determination by the executive and the judiciary to have resisted the temptation. But the consequences in the House went further. They were presented not only with a powerful recommendation but also with a complete record.

Five thousand pages of transcript, 2,800 exhibits, a report authored by John Doar and signed off by five distinguished jurists. I do not for a moment question in this forum the integrity and enthusiasm with which the House proceeded, but I do suggest that their role differed from what had been done during the first 150 years. They were auditors. They had to audit to see was the evidence there, did the report make sense. They did not have to investigate. They did not have to catch it fresh.

I submit to you that the nature of the proceeding, not with respect to Judge Hastings or its fairness to him, but with respect to the future, the nature of the proceeding is illustrated by the hearing. They did not recall the witnesses. They did not recall the defense witnesses or the prosecution witnesses. The principal witness was John Doar.

The chief prosecutor who had developed the case for the judiciary was called and, in response to questions to the special counsel retained by the House, told them what evidence the judges had heard and seen that persuaded them.

That may be a necessary departure in the context of the judiciary with 700 judges, but it is a departure. It represents a delegation, again, of the powers that the framers intended to protect judges.

The House suggests that the Constitution does not require that the Senate record any deference to the jury's verdict, nor in the

House's view can the Senate properly consider the issue of whether it is feasible at this late stage to conduct a trial that is fair to the judge.

I think on that basis, I would like to suggest to you that the constitutional principles are exactly the opposite. If the framers foresaw that an acquittal in impeachment should bar further attack on the judge, and if, because of altered circumstances, the House and the Senate and the executive and the courts have acquiesced in the system that undermines in some degree the independence of the judges by permitting the less cumbersome process of criminal prosecution and trial to proceed before impeachment, should not all three branches abide the outcome? If you agree to a change in the rules, you ought to abide the outcome of the game. That is not a constitutional principle but it is something my kids have understood since that man was acquitted.

I ask you, Mr. President, Members of the Senate, abide the outcome of a change you have been permitted. The sequence of the proceedings should not alter the result. Had Judge Hastings been impeached as he requested, had he been tried in this forum and acquitted by this body, that would have ended the matter in 1983. The House did not exercise its power then. There was no protest from the Senate. The prosecutors claimed you were too busy to handle matters of this kind, and the courts bought it. They permitted it to proceed.

He appeared. He was acquitted. Is there any reason why you should not honor the principle by applying it both ways? If there is an acquittal, it ends the matter. If there is a conviction, there is a second trial.

But let me take, if I may, the manner in which this body handled the Claiborne case to demonstrate why a second trial is necessary, even under the altered scheme in the case of a conviction, reasons that do not apply in the case of a acquittal.

The framers authorized the second trial for an accused judge for the protection of the judge. They had cut back on the power of the Senate to punish. They could not, as the House quotes, remove the head from the man as well as the holder from the office. But they could punish. They could impose what Hamilton called a doom to infamy, a perpetual banishment from office, from the society of honorable people. That is punishment. But they could not impose the full measure of the law and thus a second trial for those offenses that were not only political offenses against the United States but also offenses that violated the ordinary criminal laws so that the full measure could be exacted.

Now, the altered sections alters the function of the Senate, but makes it no less important and you all recognized it in Judge Claiborne's case. The function of a second trial in the Senate following a conviction in the courts is the function that protects the independence of the judiciary. You must at least examine the evidence to satisfy yourself that the conviction is not the product of an overreaching executive or an overreaching court system seeking to attack a disfavored judge, and that is an important function for precisely to the extent you have permitted the executive to have enhanced powers, precisely to that extent, is it your duty to forward a reciprocal check to assure that the exercise of those powers is examined?

But I want also to talk to you about the effect of the precedent you established in Judge Claiborne's case. In Judge Claiborne's case you will recall it was the House who came forward with the argument that preclusive effect should be given to jury's verdict. Article 3, he was convicted; that is enough; can we go home? It is the Senate who said no. The House has taken that lesson. You now have a second convicted judge, Walter Nixon. He is in jail. The House is now performing and has concurred in the function. They have permitted Judge Nixon's complaints against the executive and the abuse of prosecution to play out in the courts rather than precipitously coming over here.

It may be that Judge Nixon will or will not one day come before you, but you may be more confident, I submit, because of the precedent you established in Claiborne, that if it does, the record will be clearer and you may exercise your function of checking with competence.

But is there anything for you to check in this kind of case and can you do it? I submit that has two aspects. In the first, we must look at the consequences of a decision by this body to deny these motions, a possibility I must acknowledge. Mr. President, I submit, if you deny these motions, you will provide an encouragement for an aggressive high risk, prosecutorial policy by the executive. They may be relieved to know that their occasional failures can be picked up elsewhere in the system and thus they can afford not to let the money pass. They can afford to proceed without any direct evidence of the judge's involvement. We can do the undercover sting investigation using coconspirators and circumstantial evidence because if we cannot pull it off in front of the jury, there is always the judiciary of the House and the Senate and there is a second chance.

And in this case of cases it has to be in the most extreme form. Four years of investigation by the judiciary, nothing against this man. The same evidence the prosecutors had. Six years later after the trial, only one maverick charge unrelated to corruption. The judge concedes an improper disclosure would be a serious matter but there is no suggestion here he was making a disclosure to somebody he owed a debt, the two men did not know each other, it is an allegation of improper disclosure he denies.

How many citizens could endure 7 years with unlimited resources of examining their tax records, their bank records, their telephone bills, their travel records and emerge with no new evidence, only one new allegation and without complaint from the judges who serve on their court and know them best and the lawyers?

This is truly a remarkable and circumstantial case. If the executive can prosecute this kind of case with some confidence that when it fails, its failure will be picked up, you will have given them true encouragement. And the judiciary, if I understand—and I have litigated enough about it that I think I ought to have some understanding of your purposes in adopting the Judicial Conduct and Disability Act—it was primarily to create a mechanism within the jury to deal with instances of misbehavior that did not rise to the level of impeachment.

As I first read the act, I thought the impeachment certification was the "whoops" clause, a case where a complaint was filed against a judge of some form of misbehavior and in the course of their investigation, the judges conducting it said, "Oh, whoops, we have something serious here that we believe does constitute conduct arising to the level of a high crime and misdemeanor."

I did not read you and could find nothing in the legislative history that suggested you intended to assign the power to the judiciary to second-guess the verdict of a jury reached in a trial over which the judiciary presided.

But you must understand that one of the reasons why the framers did not assign power to try judges to the courts was a recognition that it destroys collegiality. A judge who is hauled before his own court and there tried is a judge who has been injured. The stain of suspicion has been irrevocably cast. Those who take a different view within the judiciary—and the judiciary is a club and may be fairly described—a different view of what correct behavior by the members of that club should be, are going to view a judge who has even come that close as unworthy of membership. The stain is there. The stain cannot be removed. The member must.

I submit an almost overwhelming kind of momentum will be generated within the judiciary if you, by denying these motions, tell the judiciary it is any of their business what happens with an acquitted judge. Anytime we have in this Nation a judge who is acquitted, we will have a public record at which the Justice Department has forcefully presented its accusations and the evidence, at which the judge's defense has been presented, at which this body may well assess, the House may well assess whether further inquiry is necessary. The House does not and should not need any encouragement from the judiciary to get on with the job. The House claims that the doctrine of separation of powers on the one hand precludes you from paying attention to the jury while it maintains on the other that deference to a coordinate branch justifies it having awaited the advice of the judiciary as to how it exercises its powers. I do not think they can have it that way.

But let me close my opening remarks by talking to you about the Senate. I am not a Member. I do not reside within the beltway. However, I have watched also and studied over time the frustrations of the Senate in dealing with this process of impeachment, even though some scholars who do not believe the acquittal should bar it have reported—Professor Tribe of Harvard—that the jury's verdict is at least entitled to that deference that will require the Senators to give special scrutiny to the evidence in this case before it can repudiate that verdict. And yet this is a Senate which in an altered plan, with 700 judges, has adopted a rule 11. I understand the reason. I do not today address the constitutionality, but I do not think anyone questions that that was a change from established practice and that that change in some degree undermined the protection of the Federal judge and the dignity of the occasion.

The question now in a case such as this, prosecutors will always have to come back for their second trial saying, "We have more evidence, not less." What was a 3-week trial with a judge and jurors granting their undivided attention will become a 12-week trial because it must be done in half-day increments, 4-day weeks to meet the demands of the legislative business.

And are you also satisfied that when the job is done, when there are 12 volumes of transcripts and documents sitting on each of your desks, you will have the time to give better scrutiny to that evidence than did the 12 jurors who heard the witnesses and studied them? I submit the House, by the course it recommends now, threatens to impose burdens upon the Senate it cannot withstand. I submit the Constitution does not require you to withstand that. The framers knew the difference between a conviction and acquittal. Where there is a conviction, two trials are authorized and may be required. Where there is an acquittal, that should end the matter. And certainly it should end the matter 6 years after the fact.

Mr. President, I would reserve the remainder of my time for Members' questions and rebuttal and will address the additional points in that context.

The PRESIDENT pro tempore. Thank you, Mr. Anderson. Mr. Anderson, Senator Gorton has submitted the following questions in writing:

> You have mentioned in your memorandum in support of the motion to dismiss articles of impeachment I through XV that a Senate hearing would not be fair in part because "crucial witnessess" have died or are no longer competent to testify. You did not request all these crucial witnesses to testify at the judicial trial. Question. Why didn't you call all these crucial witnesses to testify at the judicial trial and, secondly, why are these witnesses so important now?

Mr. ANDERSON. Let me address the Senator's question very explicitly. The Government made a choice at the first trial to confine its alleged conspiracy to the period from September 9, 1981, until October—September 10, until October 9, 1981. They focused only on those events and only witnesses who had information on those events. Judge Hastings and Miss Williams sought to compel the Government to produce its informant as a material witness. The Government represented that that witness was not material, and he was not produced.

The Government also objected to the judge's attempt to call witnesses who might establish that William Borders was a rainmaker and that all judges were vulnerable to unfounded claims. It was only after his acquittal that the judiciary was able to compel William Dredge to come forward. William Dredge was a material witness. He did report that Borders had made claims of having the power to fix numerous Federal judges and that they understood he was blowing smoke.

In the House hearings we learned, confirmed for the first time, that the FBI knew that William Borders was involved with judges other than Judge Hastings.

On its expanded record, the House now claims at some time prior to July 1, 1981, this conspiracy was formatted. They have examined records that span the period from January 1981 through well after, through the date of the trial in 1983.

Members of the Senate, there is no way the judge could have anticipated a defense to a case that was not used against him.

Now, who has died and why are they important? First of all, Mr. Dredge disclosed the most plausible scenario. Mr. Dredge was a fence, a burglar, and a major drug defendant. He had a pending case that he needed a deal in. He had been dealing with a Washington character, Joe Nesline. The most plausible scenario is that Nesline was brokering Mr. Borders' services to the judiciary and in fact was making rain and Mr. Dredge came in when he found out that Bill Borders couldn't fix a continuance in that man's court. Mr. Nesline has Alzheimer's disease. I can't explore that. The judge can't explore that. Mr. Dredge—we do not know—we have never seen him—whether he will be available. Andrew Mavrides, one of the judge's lawyers, has died. He is the one who handled the discovery negotiations.

One of the complaints, or the evidence that was not given adequate emphasis in the eyes of the House was the judge's failure to produce early in discovery the draft letters to Hemp. We can't recall that. I could go through, and I have listed in the brief—the simple answer is the judge defended himself against the accusations as the Government chose to frame them. They have now been reframed to expand the evidence at a time when we cannot and have not had the resources to respond to the expanded evidence.

The President pro tempore. Mr. Anderson, the Chair has the following question submitted by Mr. Dole:

> In your memorandum in support of the motion to dismiss articles I through XV, you argue that the lapse of time between the date of Judge Hastings' trial and the date of the impeachment trial has irrevocably prejudged the judge's right to a fair hearing in the Senate. Is it not true, however, that much of this delay was occasioned by Judge Hastings' own litigation to prevent the Investigating Committee of the Eleventh Circuit and the House Committee on the Judiciary from obtaining grand jury materials from his criminal trial?

You have 2 minutes and 41 seconds in addition to your rebuttal time.

Mr. Anderson. Thank you, Mr. President. Senator Dole, as chairman, let me respond directly. I don't know. I do know that during the course of our litigation the Investigating Committee declined to stay its hearings while we were in the Court of Appeals after briefing and argument on or challenge to the constitutionality of the act. We at that point objected and filed a special appearance so we didn't appear. I don't think we delayed the judicial investigation because they didn't slow down for our litigation.

In terms of the House and its grand jury, I cannot tell you of the impact of that. Yes, we litigated on issues we thought important to assert the rights of all judges as well as Judge Hastings. I don't think we delayed. But the question arises in a different context. If the House says that you cannot defer to the jury's decision because it was made in a different branch, what entitles the House to defer to proceedings in another branch and stay its hand?

The fact is we are 6 years after the fact. The fact is this judge has endured 6 years of investigation. The fact is the evidence in the accusations were known 6 years ago. The issue I ask the Senate to address is: Is it feasible for you to be able to conduct a fair trial of this in 1989?

The President pro tempore. Thank you, Mr. Anderson. You have 11 minutes and 16 seconds remaining.

Mr. **Anderson**. Thank you, Mr. President.

OPPOSITION TO THE MOTION

The **President** pro tempore. The Senate will now hear from Mr. Brooks in opposition to the motions.

Mr. Brooks.

Manager **Brooks**. Mr. President, Members of the Senate, pending before you is the impeachment case of Judge Alcee L. Hastings. It is a case that involves the most egregious misconduct by a Federal official: Respondent conspired to sell his public office for personal gain, he subverted our judicial process by repeatedly lying under oath, and he divulged confidential information in violation of his own court order. The evidence of Judge Hastings' misdeeds is clear and convincing. For this reason, the House of Representatives adopted, by overwhelming vote, 17 articles of impeachment.

Today, Judge Hastings asks you to ignore his corrupt conduct. He asks you to dismiss 16 of the articles on the basis of double jeopardy and unreasonable delay by the House of Representatives. In doing so, he asks you to rely on a tainted jury verdict and to disregard your unique constitutional role of ensuring the integrity and impartiality of Federal office.

In the view of the House of Representatives, you should not heed respondent's call. Our Constitution and, indeed, principles of fairness—to the American people and to the impeachment process itself—require the Senate to reject Judge Hastings' motions. The Senate should proceed with trial on all 17 articles.

This afternoon, all but one of the managers of the House of Representatives are here to present the House position in this case. Unfortunately, Representative John Conyers, Jr., could not attend due to a longstanding commitment outside the country. When this hearing was scheduled for last week, he rearranged his schedule in order to make sure he could attend. However, when the hearing was understandably postponed, the conflict arose. Representative Conyers asked me to state to this body his unfailing commitment to the House position in this impeachment proceeding and his firm belief that the Senate should proceed to consider all 17 articles of impeachment. In addition, he asked that I read to you the following statement:

STATEMENT OF MANAGER JOHN CONYERS, JR.

In his motion to dismiss, respondent asserts that the House of Representatives unfairly delayed the proceedings leading to his impeachment. As the chairman of the subcommittee that was responsible for the House investigation, I must take issue with this unsupported contention. The House of Representatives discharged its duty with fairness and from a position of neutrality. Our investigation was thorough and expeditious. And, Judge Hastings delayed the proceedings by litigating with the House over our authority to review particular documents.

I want to make clear to the Senate and to the public that when the House investigation began, I presumed the innocence of Judge Hastings, who had already been acquitted by a jury of the main charge against him, and had hoped that nothing presented to my subcommittee would compel me to change my mind. In view of the history of unfair treatment and harassment of black public officials and the significant underpresentation of black judges, I entered into the House proceedings cautiously.

Those of us who have spent careers working for justice and equality in the civil rights movement area acutely aware of the continued underrepresentation of blacks in judicial and political posts, and of the dire need to increase representation. This is especially true in the wake of an administration that appointed an appallingly low number of minorities to the Federal bench—a legacy that should and must be changed.

The entire civil rights movement, though, has been about fairness, equality of opportunity, a system of law that applies equally to everyone. We did not wage the civil rights struggles merely to replace one form of judicial corruption for another. We can no more close our eyes to corruption when practiced by those judges whose views we approve than we could to those whose views we detested.

It would be disloyal to the essential principle of equal justice under the law, and to my oath of office at this late stage of my career, to set up a double standard for those who may share my philosophy and those who may oppose it. In order to be true to our principles we must demand that all persons live up to the same high standards.

Unfortunately, the evidence establishes that Alcee Hastings has not met this standard. The House of Representatives determined that Judge Hastings did, in fact, commit high crimes and misdemeanors which justified his impeachment.

This concludes the statement of Representative John Conyers. On behalf of the House of Representatives, I thank you for the opportunity of presenting our response to the Judge Hastings' motions to dismiss. Representative John Bryant, our lead manager, will begin our presentation by addressing the issue of double jeopardy. Thank you.

The **President** pro tempore. Thank you, Mr. Brooks.

Mr. Bryant will now continue the argument for the House and the House managers have 53 minutes and 54 seconds remaining.

ORDER OF PROCEDURE

Manager **Brooks**. Mr. President, would you object too strenuously if the House Members had an 8-minute recess to go and vote on the rule on the Eastern Airline matter before the House now? The second bells have just rung.

The **President** pro tempore. Is there objection?

RECESS

Mr. **Mitchell**. Mr. President, I ask unanimous consent that the Senate stand in recess for 10 minutes.

There being no objection, the Senate, at 3:27 p.m., recessed until 3:39 p.m.; whereupon, the Senate reassembled when called to order by the President pro tempore.

The **President** pro tempore. The Senate will be in order. The Senators will discontinue conversing.

The House managers are delayed momentarily. The Chair will swear in an additional Senator.

You do solemnly swear that in all things pertaining to the trial of the impeachment of Alcee L. Hastings, judge of the U.S. District Court for the Southern District of Florida, now pending, you will do impartial justice according to the constitution and laws. So help you God.

Mr. **Kasten**. I do.

The **President** pro tempore. Mr. Bryant, you may continue.

The House managers have 53 minutes and 15 seconds.

Manager **Bryant**. Thank you, Mr. President.

Mr. President and Members of the Senate: Judge Alcee Hastings brings before the Senate today his motion to dismiss 16 of the 17 articles of impeachment which were voted by the House of Representatives by a margin of 413–3. Those articles found that Judge

Alcee Hastings entered into a conspiracy to obtain a bribe, repeatedly lied under oath and falsified evidence; and illegally and improperly divulged the contents of a legally authorized wiretap which he supervised in his capacity as a Federal district judge.

It is important to state plainly before the Senate today the proposition which Alcee Hastings urges upon this body and that is that even if he has committed the high crimes and misdemeanors alleged in the 16 articles of impeachment at issue—even if he has participated in a conspiracy to obtain a bribe, even if he repeatedly lied under oath and falsified evidence in an effort to obtain an acquittal in a criminal trial, and even if every charge raised against him by the articles of impeachment of the House is completely true, he contends that the U.S. Senate is constitutionally powerless to remove him from the Federal judiciary; and that therefore the Senate must dismiss 16 articles of impeachment without ever making a factual inquiry and without proceeding to trial.

I submit to you, Mr. President, that this is an impossible conclusion for the Senate to reach. To adopt the arguments of Alcee Hastings today would be to adopt a doctrine that the Senate is henceforth powerless to remove from office a judge who tried to sell that office for personal gain and then managed to obtain an acquittal in a criminal case by repeatedly and knowingly offering false testimony and false evidence under oath. It would mean the abandonment of the clear constitutional authority of article I, section 3, clause 6, which states unequivocally that the Senate shall have the sole power to try all impeachments, a provision which has repeatedly and consistently been interpreted throughout the history of this body to mean that no action by any other branch of Government can be determinative of the Senate's action with regard to trial of cases of impeachment.

And to adopt his argument would mean the adoption of Judge Hastings' view that the Senate should ignore the overwhelming vote for impeachment by the House of Representatives and the unanimous vote for impeachment by the Subcommittee on Criminal Justice, ignore the unanimous vote of the investigating committee of the Judicial Council of the Eleventh Circuit, which after a 3-year investigation found that Judge Hastings had participated in a bribery conspiracy, had falsified evidence and lied under oath to avoid a conviction; to accept his argument would mean ignoring the resolution of the Judicial Council of the Eleventh Circuit adopting this report; and it would mean ignoring the Judicial Conference of the United States which forwarded the case to the House of Representatives on the basis of its finding that Judge Hastings had engaged in conduct which might constitute grounds for impeachment.

Mr. President, it would be a sufficient presentation on the part of the House to end our argument here, because this argument alone is dispositive of the question of whether or not the Senate should dismiss these articles without proceeding to trial; and we would end here but for one fact: our view is that the Senate is likely to do as the House did and ask not merely is the procedure on which we are embarking legal but, in the specific case before us, is it fair?

The answer to this question requires an examination of the facts in the case. They involve, as the chairman said, a multitude of egregious acts by a man who holds one of the most esteemed positions of public trust, that of a Federal district judge.

Over a period of 5 years, Judge Alcee Hastings engaged in a clearly discernible pattern of misbehavior. He committed the most basic corruption of office—conspiring to obtain a bribe. He then subverted our system of justice by fabricating exculpatory evidence and knowingly testifying falsely under oath in order to obtain a verdict of acquittal.

Two years later while supervising a lawful wiretap in his court, Judge Hastings divulged confidential evidence obtained from that wiretap, thereby threatening the lives of law enforcement agents and undermining two ongoing Government investigations into municipal and waterfront corruption in Miami.

In article I of the articles of impeachment, the House of Representatives charges Judge Hastings with conspiring with William Borders, a Washington, DC, attorney, to obtain a bribe. In articles 2 through 15 the House of Representatives charges Judge Hastings with lying under oath in 14 separate instances during his criminal trial on the bribery charge.

The evidence supporting these articles of impeachment, simply put, is overwhelming. In his memorandum in support of his motion to dismiss Judge Hastings paints a picture of himself as a pillar of integrity who was duped by his unscrupulous friend. I maintain today on behalf of the House and the House managers that this memorandum in support of his motion is the latest in a long series of deceptions designed to mislead, a memorandum characterized more by its omission of critical facts than by its accuracy.

On September 12, 1981, William Borders, a Washington attorney and close personal friend of Judge Hastings, entered into a deal with an undercover agent who was posing as Frank Romano, a defendant in a case pending before Judge Hastings in his Federal district court in Florida. At that meeting, Borders and the undercover FBI agent agreed that for $150,000 Judge Hastings would reduce the sentences he had imposed on Mr. Romano and his brother from a prison term to probation.

William Borders was subsequently convicted by a Federal jury of having engaged with Judge Alcee Hastings in a conspiracy to obtain a bribe and was sentenced to 5 years in prison.

Judge Hastings was tried nearly 1 year later after having had the opportunity to have his observers carefully watch the trial of the Borders case before preparing his own defense.

The House calls upon the Senate today to consider only a few examples of the evidence that Judge Hastings was a part of this illegal conspiracy:

First, at their initial meeting, the undercover agent, posing as a defendant, insisted upon a sign indicating that the judge was indeed an active participant in the bribery scheme before he paid any money. The undercover agent and William Borders agreed that the judge, to prove his participation, would present himself in the Fontainebleau Hotel in Miami Beach at 8 p.m., on Wednesday, September 16, 1981. Mr. President and Members of the Senate, on Wednesday, September 16, at the appointed time, FBI agents staking out the premises observed Judge Alcee Hastings enter and sit down to dinner at the main dining room in the Fontainebleau Hotel.

Second, the tape recording of the first meeting between William Borders and the undercover agent reveals that Borders, the close personal friend of Judge Alcee Hastings, had detailed and extensive knowledge of the *Romano* case which was pending in Judge Hastings' court. Where did he get this information? Mr. Borders was not a member of the Florida bar. He was a member of the District of Columbia bar and lived in Washington, DC. He did not practice in the Miami courts. The system in effect at this time in the Miami courts required that the public file of the *Romano* case was kept in Judge Hastings' chambers; and the case received no national publicity.

In that first tape recorded meeting Borders also promised an order from the judge, an order which would return a substantial part of Romano's property which Judge Hastings had earlier ordered forfeited under the RICO law. That order which had been lying dormant in the judge's chambers for 3 months was then issued. On the day it was issued, before it was even signed, Borders assured the undercover agent, in a recorded conversation, that the order would come out that day or the next. In fact, the next day it did go out—not like a routine order would go out; this order was sent special delivery.

Of special significance are the events of October 9, 1981, the day William Borders received the final installment of $125,000 in bribery funds from the undercover agent and was immediately arrested by FBI agents in Washington, DC. Judge Hastings was in Washington that same day. Shortly after Borders' arrest, Judge Hastings was notified and given the names and phone numbers of FBI agents who wanted to interview him in connection with this matter. In spite of his sworn oath to uphold the laws of this land, Judge Hastings did not contact the agents or inquire in any way about the allegations involving corruption in his own courtroom. Instead, he immediately left town—so quickly that he left clothing behind in his hotel and failed even to check out. Instead of taking a 10-minute cab ride from the L'Enfant Plaza Hotel where he was staying to National Airport where there were regular flights to Miami with seats available, Judge Hastings took a $50 cab ride 32 miles to Baltimore/Washington International Airport where he obtained a new ticket to Miami. He boarded this flight, yet he left the plane at an intermediate stop in Fort Lauderdale and rented a car rather than continuing to Miami where his own car awaited him in the parking lot.

Finally, we must make reference to the repeated instances of lying under oath by Judge Hastings at his criminal trial.

It is noteworthy that when Judge Hastings left his plane at the intermediate stop in Fort Lauderdale and rented a car, he drove not to his office, not to Miami, not to his home, he drove instead to the home of his girlfriend/fiance Patricia Williams. Mrs. Williams, who had never before tried a criminal case, was thereafter named as Judge Hastings' attorney in the bribery/conspiracy trial arising from these events. This curious action of hiring a person with whom he had a close and personal relationship rather than an experienced trial attorney to defend him against charges which could have led to his imprisonment was commented upon by the Eleventh Circuit Investigating Committee. I quote:

> His actions in preparing and presenting a defense and in presenting his own testimony were done in a context in which eventually only he and his fiance/girlfriend were serving as counsel and the propriety of what was being done was not subject to the scrutiny of counsel having usual professional detachment.

This curious circumstance has special relevance when one considers the repeated instances of false testimony by Alcee Hastings in the trial defense conducted by him and his fiance/lawyer.

He testified that he was not trying to avoid the FBI when he left Washington in such haste but testified that he left instead because of information he received in two phone calls that he had made from his hotel to his mother and to his fiance/lawyer Paricia Williams. However, there is absolutely no record of such calls. Neither the hotel phone records, Judge Hastings' business or home records, his mother's telephone records nor Patricia Williams' records reflect these calls which Judge Hastings swore under oath he had made from his hotel room. Further, a witness who was with the judge from the moment he learned of Borders' arrest until he left the hotel lobby to catch a cab to Baltimore-Washington Airport has repeatedly testified that Judge Hastings did not make any calls.

For reasons that will become clear at trial it was significant for Judge Hastings to establish that he made a series of calls to a friend named Hemphill Pride. Judge Hastings, at trial, specifically testified under oath that the calls on telephone records handed to him at trial by his counsel, Patricia Williams were calls made to Hemphill Pride. What the jury did not know was that four of these calls were to people who had absolutely no connection to Hemphill Pride and were to numbers to which Mr. Pride had no access. In fact, one call was made from the phone in Patricia Williams' apartment and it was made to Mrs. Williams' former mother-in-law. The evidence is overwhelming that the judge knowingly perjured himself in an effort to mislead the jury. And these false statements have been so plainly exposed that he has been forced to admit this misrepresentation in his answer filed before the Senate.

This is only a fraction of the evidence establishing that Judge Alcee Hastings knowingly participated in a conspiracy to obtain a bribe; it is only a fraction of the evidence establishing that again and again Judge Hastings lied under oath and fabricated evidence to conceal his part in this scheme, in order to obtain an acquittal.

This proceeding does not permit a greater examination of the facts. But the facts set forth so far permit the Senate to examine clearly the question of fairness, and the assertion of the respondent that these articles of impeachment should be dismissed. The House maintains that this argument of fairness should be reversed and applied to the respondent himself: should he be allowed to profit from his own misconduct of lying under oath and falsifying evidence and thereby be protected from an impeachment trial in the Senate? Surely not.

Indeed, fairness would require the Senate to conduct a trial and remove from high office a judge who tried to sell that office for personal gain and then managed to obtain an acquittal by deceit.

And as we debate fairness, it is pertinent to ask, is it fair to the American people to allow a corrupt judge to remain on the bench thereby forcing the public to bring their disputes and grievances before a judge who himself conspired to obtain a bribe and perverted the system to avoid being discovered in this role? Clearly not. I must emphasize here today that the only protection of the public against the rare but potential abuse of the lifetime tenured Federal judiciary is the power of the Senate to try impeachment cases such as the one before it.

Judge Hastings has raised a second argument: that the concept of double jeopardy prevents the Senate from taking up a matter which has been previously tried and found in the defendant's favor. This is a contention which the House considered very carefully for we had the same doubts which no doubt bother Members of the Senate on first examination. But even the most cursory examination reveals that this argument is premised on pure fiction, that it lacks totally any credible, historical or legal basis.

Article I, section 3, clause 6 of the Constitution states, "The Senate shall have the sole power to try all impeachments." Article I, also provides that the House of Representatives "shall have the sole power of impeachment." In other words, the framers of our Constitution placed in the hands of Congress an important responsibility: The responsibility to act as a check on the conduct of executive officials and all Federal judges. If a civil officer engages in a high crime or misdemeanor, he or she is subject to impeachment by the House. The Senate then has the sole power of removing that official from public office.

The respondent's double jeopardy argument ignores the role the Senate plays in this fundamental scheme of checks and balances.

And, more fundamentally, his argument ignores the constitutional doctrine of separation of powers, which establishes that one branch of our Government cannot delegate to another branch its unique responsibility. The respondent's double jeopardy argument fails because it asks the Senate to do just that—to delegate to the judicial branch the Senate's authority to determine whether a civil officer should be removed from office.

In an earlier Senate impeachment proceeding, you recognized in this body your important constitutional role and refused to do exactly what Judge Hastings is asking you to do today. Just 3 years ago, in the impeachment trial of Judge Harry Claiborne, the Senate committee appointed to hear the evidence declined to be bound by the verdict and findings in Judge Claiborne's criminal case—even though that criminal case had charged the judge with the very same misconduct as the articles of impeachment. As explained by the chairman of the Senate committee, Senator Charles Mathias, "The Senate has the 'sole power to try all impeachments.' We have no authority to delegate that responsibility to any other branch." Senator Mathias went on to state:

> If our obligation to try all impeachments results in the expenditure of our time and resources or creates the possibility that our conclusions may differ from those of the judiciary in exercising our separate constitutional responsibilities, that would be a result of the Framer's design and not of our personal wishes.

The same is true in this case. The Constitution vests the Senate with the sole power to try a Federal official for impeachable conduct. A prior jury verdict does not bind the Senate. Neither the jury verdict that found William Borders and Judge Hastings had conspired to obtain a bribe, resulting in Borders' term in prison, nor the verdict in Judge Hastings' separate trial is binding on the Senate. Contrary to Judge Hastings' assertion, the Senate is the only body that can determine whether he should remain on the bench for life.

Finally, the Senate should not ignore the 200 years of precedent establishing that Judge Hastings' double jeopardy argument has no sound legal or historical basis.

Respondent's argument rests entirely on a single false premise: that impeachment is somehow criminal in nature. Judge Hastings must convince you that an impeachment trial is a criminal proceeding, for then and only then would the doctrine of double jeopardy even arguably apply. Impeachment, as all precedents indicate, is not a criminal proceeding. Rather, the Constitution establishes—and the framers, the Congress and constitutional scholars have consistently concluded—that impeachment is a remedial proceeding designed to protect the institutions of Government and the American people from abuse of the public trust. In this country, impeachment has never functioned as a criminal process. Impeachment does not require an indictable offense as a basis for removal from office. Impeachment does not require proof beyond a reasonable doubt to establish the allegations. Impeachment does not call for trial by jury. Impeachment is not subject to Presidential pardon. And above all, the purpose of impeachment is not to punish an individual, but rather to preserve and protect our constitutional form of Government.

It is beyond dispute that subsequent to a criminal trial, there can be remedial proceedings arising out of the very same facts, without running afoul of principles of double jeopardy. In fact, severe noncriminal sanctions—such as deportation, disbarment, and license revocation to name a few—can be imposed in a proceeding following a criminal trial, even if the criminal trial results in an acquittal under current law. The point is that the doctrine of double jeopardy in this case is irrelevant and is no bar to the Senate's proceeding in the trial.

It is for this reason that Judge Hastings' double jeopardy argument fails. Impeachment proceedings, including the pending matter of Judge Alcee Hastings, are remedial and, therefore, are not subject to double jeopardy principles.

I would refer you to the very language of our Constitution at article I, section 3, clause 7, which reads:

> Judgment in cases of impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, trust, or profit under the United States; but the Party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

This clause contemplates two separate and distinct processes. A Federal official is subject to both impeachment and criminal prosecution. Punishment of the official is left to criminal prosecution, while impeachment serves the entirely different purpose of preserving integrity in the conduct of public affairs. One proceeding is not a substitute for the other. The limited constituency of those who are subject to impeachment—the President, Vice President, and civil officers—and the limited sanctions which can be imposed—that is removal and disqualification from office—underscore that impeachment is remedial and noncriminal in nature. Even if the impeachable offense were treason, all the Senate can do is protect the institutions of government by preventing the public official from holding Federal office.

The debate of the writers, the framers of the Constitution reinforces this conclusion and all the legal analysis since that time consistently concludes that impeachment is not criminal. In our brief filed with this body we set forth the precedent in detail.

And our precedent is not a position fashioned by the House solely for purposes of case. There is a long and clear path stretching from this very Congress back to the inception of our Nation which establishes the remedial nature and noncriminal nature of impeachment.

Recently, the Rules Committee of this Senate in this Congress recognized that impeachment is not a criminal proceeding. In its report on the procedures to be used in Judge Hastings' case, the Rules Committee concluded, I am quoting at this point, "Most important, it must be remembered that an impeachment should not be viewed as a criminal prosecution."

In addition to resting on a faulty premise, Judge Hastings' double jeopardy argument leads to unwarranted and unacceptable results which warrant your contemplation today. If one follows his argument to its conclusion, no Federal official who has been subject to criminal prosecution could ever be subject to impeachment."

The established law of double jeopardy prohibits a second criminal trial if the accused has been acquitted or convicted in an earlier case. Thus, application of double jeopardy law to impeachment would have the untenable result that the Senate should not have removed Judge Harry Claiborne from office, because he had been criminally convicted in an earlier proceeding. Moreover, the House would be barred from bringing articles against Judge Walter Nixon based upon the same conduct which resulted in his conviction for perjury, and for which he is currently serving a 5-year sentence.

Under the respondents' theory, we would be treated to the spectacle of the executive branch racing to the courthouse, in order to avoid being preempted by the legislative branch we would need to create a coordinating committee between the legislative and the executive to decide who goes first, and I submit to you we should not have to deal with these issues. They arise only when you seek to impose double jeopardy principles in an area where it has no application, an impeachment trial.

Respondent tries to avoid these absurd results by arguing that double jeopardy only applies if impeachment follows an acquittal in a criminal trial—this argument he made a moment ago—but does not apply if the criminal trial resulted in a conviction. Considering this, it would twist the language of the Constitution beyond recognition. It would distort the established law of double jeopardy. It would make the Senate subordinate to the judiciary, even though the Senate's role in impeachment is unique and explicit in the Constitution. Finally, it would depart from 200 years of constitutional history. That we submit, is an exorbitant price to pay, in order to carve out a special exception for Judge Alcee Hastings.

There is one other aspect of Respondent's argument which should be addressed, his argument that articles I through XV have to be dismissed if you accept his contention that double jeopardy applies to an impeachment. That is incorrect, even if the Senate were to accept his position. Assuming for argument's sake that the principles of double jeopardy were to be applied to the articles, a result the House would vigorously oppose, only four of the articles—articles I through IV—would be barred by principles of double jeopardy. That is because only those first four articles present the same question which the jury decided in the criminal case: Did the Government prove beyond a reasonable doubt that Judge Hastings knowingly participated in the bribery scheme? None of the other articles presents questions the jury necessarily decided in the criminal case and, therefore, they would not be barred even if, by the most unfortunate circumstances, the Senate accepted the double jeopardy argument of the respondent.

The position of the House that an impeachment trial is not a criminal proceeding, I have made clear, is consistent with constitutional language, history, scholarship, and precedent available, and there is no valid reason to depart from our constitutional precedent as it stands before the Senate today.

There is, on the other hand, every reason for the Senate to deny Judge Hastings' motion to dismiss on the basis of double jeopardy.

Mr. President and Members of the Senate, ultimately, the Senate's decision whether to dismiss 16 of the 17 articles of impeachment as requested by the respondent must rest on the combination of legal principles and factual considerations taken as a whole.

It is with a great sense of offense that the House looks upon the respondent today as he raises the most cherished and fundamental constitutional protections and principles to shield himself from the consequences of his inexcusable breaches of the public trust.

This judge, who urges you to hold uppermost in your mind and interpret favorably to him sacred constitutional principles, abandoned his oath of office and his sworn duty to this Constitution in 17 instances enumerated in the articles of impeachment presented to this Senate by the House.

It is fair for you to ask, and for me to raise the question as we contemplate this judge, if he had the lofty concepts of fundamental fairness and due process on his mind as he presented himself at the Fontainebleu Hotel at precisely the time and on precisely the day arranged by his coconspirator to prove that he was a part of the conspiracy to obtain a bribe.

It is fair to ask, as we contemplate this judge, if he had constitutional sanctity and due process uppermost in his mind as he was speeding down the Baltimore/Washington Parkway—leaving town so fast that he left behind his clothes and failed to pay his hotel bill, fleeing a possible encounter with the Federal Bureau of Investigation which had asked to talk to him about the events of that day.

And it is fair to ask if this judge had the strict application of Constitutional protections and institutional integrity, which he so vigorously urges upon this Senate today, in mind when he falsely testified regarding telephone records saying that they reflected calls which they clearly did not reflect; which he admits today they did not reflect.

None of us, not one of us denies that this respondent is entitled to due process under the law in these proceedings. But the American people and our institutions of constitutional government are also entitled to due process of law, and that is why the Senate should reject this motion to dismiss and try the 17 articles of impeachment which were voted by a vote 413-3 by the House of Representatives.

I thank the Senate for permitting me to make this presentation. The remainder of our presentation will be made by Representative Synar, by Representative Gekas, and Representative Fish.

The **President** pro tempore. Thank you, Mr. Bryant.

Mr. Synar will now continue the argument for the House. The House managers have 24 minutes and 40 seconds and some questions. And some questions.

Manager **Synar**. Mr. President, Members of the Senate, Judge Hastings has argued to this body that article I through article XV of the articles of impeachment should be dismissed on the grounds that the House of Representatives unreasonably delayed the adoptions of the articles. He claims that the length of time between the offense and the adoption of these articles by the House violates the basic concept of fundamental fairness. The Senate should reject this argument and deny the respondent's motion. His position is without merit, factually, or legally.

The interval between Judge Hastings' misconduct and the adoption of articles of impeachment by the House of Representatives was neither extraordinary nor unfair.

The offense charged in article I, the bribery conspiracy between Judge Hastings and William Borders, occurred in 1981. The offenses charged in articles II through XV, the perjury committed by Judge Hastings at his criminal trial, occurred in February 1983. Seven and five years later respectively, on August 3, 1988, the House of Representatives impeached Judge Hastings for these and other offenses.

There is no statute of limitations applicable to the articles of impeachment, for neither the Constitution nor House or Senate rules require that articles be adopted by the House or presented to the Senate within any particular length of time. Therefore, as a matter of law, article I through article XV cannot be dismissed due to the time that has passed since the commission of the offenses.

Rather, Judge Hastings must be raising the equivalent of an equitable defense of laches, which requires a showing of inexcusable and unreasonable delay prejudicial to Judge Hastings. We believe that the laches defense should be rejected for four reasons.

First, the doctrine of laches does not apply to the Federal Government because the enforcement of public rights and the protection of the public interest cannot be terminated by the mere passage of time.

Second, even assuming that a laches defense were to apply to the House of Representatives, Judge Hastings delay argument has no merit. The time period between the commission of the offense and Judge Hastings' impeachment falls well within historic precedent. For example, in the impeachment proceeding for Judge Charles Swayne two of the six articles alleged offenses occurred more than 12 years prior to the adoption of the impeachment articles by the

House of Representatives. Most recently, in the impeachment trial of Judge Harry Claiborne, 6 years elapsed between the misconduct and impeachment. The Senate has never dismissed consideration of articles of impeachment on the basis of the lapse of time.

Third, the adoption of articles I through XV was timely, proceeding in accordance with the mechanism specifically designed by the Congress to investigate the judiciary. Surely it is not inappropriate for the House to defer to this procedure adopted by the Congress.

Fourth, and most important, much of the time elapsed stems from litigation initiated by respondent or engendered by his opposition to the disclosure of grand jury and other documents to both the House of Representatives and the Investigating Committee of the Judicial Council of the Eleventh Circuit. For example, Judge Hastings litigated with both the House and the Judicial Investigating Committee to prevent access to relevant information and documents. The House was delayed approximately 1½ years in obtaining necessary information for its investigation because of Judge Hastings' tactics.

The respondent further claims that he has been prejudiced by delay is also without merit. Nearly all of the witnesses who will testify with respect to articles I through XV have testified under oath in other proceedings. The House will stipulate to the authenticity of this testimony. Three of the unavailable witnesses named by the respondent were never even called by respondent at his criminal trial, nor does he explain in any detail why their testimony is now so crucial to his defense. The other two unavailable witnesses listed by respondent have had their sworn testimony recorded in previous trials.

The members of the Subcommittee on Criminal Justice who investigated this matter were cognizant of our constitutional responsibility to make an informed and independent decision about whether Judge Hastings should be impeached. The investigation and hearings were conducted in that manner.

Shortly after the conclusion of the hearings which began in May 1988, the Committee on the Judiciary recommended adoption of 17 articles of impeachment. The House of Representatives adopted these articles 1 month later on August 3, 1988.

Members of the Senate, as a matter of public policy the confidence of the public in the integrity of the judiciary is paramount. The public interest cannot be defeated by the argument that a corrupt judge should not be removed because the House of Representatives did not rush to judgment. Even if the defense was applicable to an impeachment proceeding that we look at today, the facts of this case clearly do not warrant dismissal of the articles. We ask you to reject Judge Hastings argument.

The PRESIDENT pro tempore. Mr. Gekas will now continue the argument for the House.

Manager GEKAS. Thank you, Mr. President, Members of the Senate. Alcee Hastings has filed, as part of his motions today, wants to dismiss the final article, article XVII, which in artful terms may be referred to as the omnibus article. In that particular article, the House of Representatives, in bringing this matter to you, has put together the accumulation of all the offenses that the record and the evidence disclose. This is a proper way in which to approach the totality of this case and to make the final impression on the Senate of the seriousness of this entire proceeding.

You have, as Members of the Senate, substantial precedent upon which to base a deliberation on that omnibus article because, as has been referred to by previous presentations here, five convictions were had on the floor of the Senate in its history and three of them specifically were founded on the ultimate omnibus article in those proceedings. In one or both of the others, the conviction was obtained even though no omnibus article appeared at all, meaning that of the convictions on the omnibus article, it was unanimous among the three convictions.

So precedent is with you in the consideration of the decision whether or not to consider the omnibus article. But beyond that, I think that the wording of the article itself, the omnibus article, demonstrates in careful and proper language what its meaning really is.

It says in article XVII after the preliminaries that the reason that we seek consideration of this article is that all these actions and conducts and misconducts on the part of Alcee Hastings undermine confidence in the integrity and impartiality of the judiciary and betray the trust of the people of the United States thereby bringing disrepute on the Federal courts in the administration of justice by the Federal courts.

That is the essence, that is the conclusion of all that have gathered as managers of the House in the proceedings thus far and which we carried to you with fervor and with the respectful request that you consider all of the evidence as a total picture of the conduct of Alcee Hastings.

Can you imagine in these proceedings, not just the corrupt bribery case that has been alluded to, but a Federal court judge fleeing from the scene, fleeing from Washington, DC, where the alleged bribery took place, fleeing, although he maintains he was never a part of it, fearful of responding to a call by the FBI that they wished to discuss a matter with him, a Federal judge refusing, first of all, to acknowledge that a call was made by the FBI, refusing to meet with the FBI and then fleeing with as much haste and as much commotion as was possible to engender, fleeing the scene—this is a Federal judge we are talking about—does that betray the trust of the American people as outlined in the article? Does that damage the integrity of the Federal court system? Is it destructive of the very judicial process of which he is supposed to be a champion?

Can you imagine a Federal court judge purposely committing perjury in front of another judge, or a jury? Is this not destructive of the judicial process? Does this not betray the trust of the American people? These are the contents of this omnibus provision article XVII which Alcee Hastings wishes the Senate to dismiss.

And then can you conjure up the tragic picture of a wiretap situation in which the Congress of the United States has fashioned a statute that said it wanted to protect the wiretap syndrome from abuse by making sure that a judge would oversee and control the issuance and maintenance of a wiretap?

Can you conjure up the scene of a Federal judge who involves himself in one of these, signs an order, issues a wiretap and then himself, this Federal judge, leaks the information, discloses the pertinent information, putting at risk the lives of law enforcement officers and others involved in a possible investigation that was to ensure from that wiretap?

If that is not destructive of the judicial process, if that does not betray the trust by itself of the American people and their confidence in the integrity of the judicial system and does not poison everything that the judiciary means to America, then I do not know what does. And then when you put all of it together, omnibus article that it is, the totality, the series of events, the course of conduct, the course of misconduct, put it all together, you can see the vitality that article XVII carries to the final deliberations of the Senate of the United States. These acts of omission and commission, these acts destructive of the judicial process, act as a cancer on the body politic and cry out for excision and final decision by the Senate of the United States. I thank you.

The PRESIDENT pro tempore. Mr. Fish will conclude the argument on the part of the House. The managers have 12 minutes and 4 seconds left, and there are some questions. Mr. Fish, would you like to reserve some time for the questions?

Manager FISH. Yes.

The PRESIDENT pro tempore. How much time would the House managers wish to reserve?

Manager FISH. I think I will conclude in about 4 to 5 minutes, Mr. President.

The PRESIDENT pro tempore. You will conclude in 4 to 5 minutes. Very well.

Manager FISH. Mr. President and Members of the Senate, for the reasons developed by my colleagues, we respectfully ask the Senate to deny Judge Hastings' motions to dismiss and to conduct a trial on all the articles of impeachment. The Senate in our view should afford Judge Hastings every reasonable opportunity at trial to refute the House's evidence but should not dispense with the trial process contemplated by the Constitution.

The imperative to "establish justice," to cite the words of the preamble, is a preeminent objective of our constitutional democracy. We trust our judges to administer the law fairly and thus to protect the rights of all our citizens. Judge Hastings, however, subverted the rule of law by abusing judicial power for financial gain. He turned a criminal trial into a forum for deceit by offering fabricated evidence and false testimony.

Two juries reached irreconcilable verdicts: William Borders was convicted of engaging in the Borders-Hastings bribery conspiracy and Judge Hastings was acquitted. The Senate cannot correct the miscarriage of justice that resulted from Judge Hastings' misconduct at his criminal trial. But by the same token, the Senate, in our view, should not confer on him immunity from the impeachment-related consequences of his action.

The double jeopardy clause which protects individuals against successive criminal prosecutions for the same conduct has no application in the context of impeachment. Criminal trials and impeachment trials, under our constitutional scheme, are the responsibilities of separate branches of the National Government. Our constitutional founders viewed division of governmental powers as an indispensable safeguard for the protection of liberty. The fact that one branch of Government cannot both deprive certain public officials of their freedom and remove them from office is an important part of that constitutional blueprint.

An impeachment trial cannot be combined with a criminal trial in a single motion. The impossibility of joinder only underscores the fact that there is no unfairness in separate trials. In the United States, criminal charges and allegations of impeachable offenses simply are not susceptible to a unified disposition. The House of Representatives, which had no role in Judge Hastings' criminal trial, remains free to present at an impeachment trial evidence of impeachable conduct including evidence never considered by a jury.

The House of Representatives acting in a timely fashion adopted articles of impeachment citing numerous incidents of misconduct, each warranting removal from office. The pattern of wrongful acts is totally incompatible with judicial service.

There is no constitutional foundation for Judge Hastings' objections to proceeding with the trial on articles I through XV and on article XVII of the articles of impeachment. The managers, therefore, respectfully request that Judge Hastings' motions be rejected.

The PRESIDENT pro tempore. Senator Metzenbaum submits the following question to be addressed by counsel for the House managers:

> If Judge Hastings can be charged with perjury for lying on his own criminal trial, can every acquitted defendant in a criminal case henceforth be charged with perjury for lying at his own trial? If not, why not?

Manager BRYANT. The question propounded by the Senator from Ohio relates to the procedures in the judicial branch. It does not relate to the procedures in the legislative branch which has reserved unto itself, or which has had explicitly delegated to it by the Constitution the power of impeachment, exclusive of all others. The answer to your question directly is that, yes, in the judicial branch, a person who is acquitted can later be tried for perjury for having lied at his trial. That is the direct answer.

The PRESIDENT pro tempore. Further question for the House managers by Mr. Biden:

> Since we do not have the opportunity to hear all the evidence, all the witnesses, how much weight, if any, should we give to the fact that 12 of our fellow citizens did hear all the evidence presented by the Federal Government and found the judge not guilty, notwithstanding the fact that this is a remedial proceeding?

Manager BRYANT. That is the basic, the most important question which each of us considered as we took up this matter in the House, and it is one that worried all of us initially a great deal. The answer very plainly is this: There can be no deference paid by this body or by the House to the notion that somehow the judicial branch can have any impact on whether or not the House impeaches and whether or not the Senate convicts.

How much deference should be given to this jury verdict? It should be taken in the context of the exhaustive investigations and the unanimous vote of the Subcommittee on Criminal Jurisprudence, the exhaustive investigations of the chief investigator for the Judicial Council of the Eleventh Circuit and the vote of the Judicial Conference of the United States, all alleging that perjury was committed, falsification of evidence took place in the trial which induced these jurors to reach their conclusion and not convict him. That is the most important point that I can make with regard to that trial.

The **President** pro tempore. The Chair has no further questions for the House managers. The Chair thanks the managers. Now the majority leader has a question for Mr. Anderson.

Mr. Anderson, you have 11 minutes and 16 seconds remaining. The question is as follows:

> You argued that the charges now before the Senate are the same charges for which Judge Hastings was previously tried and acquitted. Articles V through XV allege that Judge Hastings made false statements in the course of that trial. Do you contend that the charges in articles V through XV are in fact the same charges for which he was previously tried and acquitted?

Mr. **Anderson**. Under established jurisprudence, yes, sir, I do. I would direct the Senate's attention to note 41 in our opening brief, which is on page 64. At that time, I represented that the House had made no claim that a proper distinction could be drawn among these articles and I invited them to correct us if they were wrong in that view.

In their written response, they did not as a matter of therapy or therapeutic. I addressed the Senator's question in note 2 in our reply, at page 212. It has long been established that under Federal law the Government is collaterally estopped from claiming that a defendant who took the stand, denied the charges against him, proclaimed his innocence, and who was believed by a jury, could later be prosecuted for having lied, having told false testimony, in what the jury believed.

That principle has been accepted by the Supreme Court as so fundamental that it has become part of the due process clause and the double jeopardy protections that flow from that clause in applying it to State court proceedings.

Yes, we do claim. We submit the only articles that could conceivably fall outside that are the four telephone calls to Hemphill Pride. There is no dispute between Mr. Pride's testimony and the judge's that the calls were made. There is no question that Judge Hastings misidentified those numbers and offered them to corroborate a fact not in dispute.

I would ask the Senate, should you think a fair distinction can be drawn in light of the fact that we drew the issue out and asked the House to address it in writing, if there is any on your mind call for supplemental briefs. That simply is not the point that you are concerned with at this point.

Let me use balance of my——

The **Presiding Officer**. The chair has an additional question addressed to Mr. Gekas from Mr. Levin.

The Chair would suggest it might be better to proceed with the questions because counsel for respondent might wish to address some of the questions in his rebuttal.

Mr. Levin asked the question of Mr. Gekas:

> If the Senate, after hearing all the evidence, concludes that the evidence is insufficent to support a conviction on any of the first 16 articles of impeachment, putting aside precedent, could you explain how the Senate could logically conclude that the

mere accumulation of that insuffificent evidence could support a conviction under article 17?

Manager GEKAS. Under that hypothetical situation, I say to the President and Members of the Senate, if indeed all of that were to have occurred, the Senate could still convict on the omnibus article on the basis that all these acts, even if individually they did not add up under your hypothetical to a conviction on any one of them, but put all of that conduct together, that made up at least the allegations which you find insufficient or insufficient evidence, put them all together, you could still find as Members of the Senate that indeed Alcee Hastings violated the trust that is implicit in the positioning of an individual on the Federal bench and that indeed this was destructive of the judiciary in its form.

That is the purpose and the scope of the omnibus article. Standing alone, even though it is a sum total of all that happened before and all the other articles, it shows a sweeping betrayal by Alcee Hastings of the very essence of being a judge.

The flight, the machinations, the letters, the perjury, the lying, the betraying of a wiretap, all these things flowing down this stream of misconduct end up in a conclusion that under the 17th article this Alcee Hastings should not longer serve as a judge, even if under your hypothetical you could not find sufficient evidence to clear doubts that you might have on any one of those preceding articles.

The PRESIDENT pro tempore. Mr. Anderson, the Chair has two questions. The Chair would address them to the counsel. He may elect to answer them in the course of his rebuttal or may wish to answer them before proceeding with his rebuttal.

From Mr. Biden:

How do you respond to the case made by House managers that even if your double jeopardy arguments pertain they pertain to only four articles?

Mr. ANDERSON. Senator Biden, to the extent I was on notice that that was an argument that would be interjected, I have attempted to address it concisely in note 2 at page 212 of our reply.

Mr. Weingarten, an experienced prosecutor, a prosecutor who prosecuted in the ABSCAM case, who prosecuted Judge Walter Nixon, argued point by point to the jury the facts that have been given to you, the suggestion of Judge Hastings' flight, the dinner at the Fontainebleau, all of the facts with the exception of the four telephone calls were presented at trial. In order to convict Judge Hastings, the jury would have had to believe the judge's explanations were false. Point by point Mr. Weingarten said you must find that his testimony about the Fontainebleau fall and marshall circumstances, you must find this explanation of his sudden departure, his return to Miami false. You must ignore the fact that when he returned to Miami, he spoke to the FBI voluntarily, and freely for 2 hours on the evening of October 9. Mr. Weingarten argued it, and in words that are strangely reminiscent of manager Gekas. He said: "Can you believe a judge who would take the oath before you and tell a falsehood and must you not accept this as additional evidence of his guilt?"

The jury that heard the evidence on both sides said no. Established law creates a presumption, and quite apart from the barred prosecution. It creates a presumption of prosecutorial retaliation when the prosecutor loses once, and then claim the defendant's explanation must have been a lie, so we are going to prosecute him for perjury. You could have perpetual prosecution with no protection from double jeopardy.

The **PRESIDENT** pro tempore. Mr. Anderson, Senator Biden asks one additional question.

> How do you respond to the historical evidence indicating that impeachments were not intended to be penal but were intended to be necessary in cases when the public trust has been abused? One example of such evidence is from Federalist No. 65 in which Publius wrote that impeachments 'Are of a political nature as they relate chiefly to injuries done immediately to the society itself.' Another example can be found in the writings of Joseph Story, who referred to impeachment as 'Not so much designed to punish an offender as to secure the state against gross official misdemeanors.'

Mr. **ANDERSON**. Senator Biden, let me respond first to Publius who I think because he was one of the framers, is more germane, and let me then turn to Joseph Story.

You must—it seems to me the House and the defense, the respondent, have common ground. Impeachments in England were criminal. They had no other meaning. It was a unique form of criminal proceedings. The House of Lords was not required to reach a unanimous verdict. It could convict on a simple majority. The House of Lords could separate the head as well as the holder from the office. That was punishment.

When you were talking, the House of Lords also had jurisdiction to try and convict for offense, political offenses, against the state which would not constitute crimes of ordinary law. In that context, the framers, and I think Hamilton's views confirm it, were concerned to confine the Senate's power to punishment to recognize the very fact that it could convict for political offenses that were not offenses under the ordinary laws should result in the restriction of its power to punish.

Let me respond to the historical—all proceedings initiated by the State are or should be remedial. To incarcerate an offender is remedial. It removes the offender from society and protects them.

All punishment, the death penalty, is remedial. A fine is remedial. That is not the distinction. The distinction is: Is it purely remedial or does it have a punitive aspect?

Hamilton called the punishment the power to doom to infamy, the power to banish to perpetual ostracism. We are not talking about a Merit Systems Protection Board proceeding should this man be removed from office. We are talking about the power of this body to order that he shall never be permitted to return.

Senator Biden, in reviewing the historical evidence, and as part of my rebuttal, let me pose six questions that I posed in reply that I have not heard addressed. Impeachment was criminal. That was its only means at the time the framers used it. It had no other meaning. Why did they choose the word if they wanted a different calling of the proceeding? Our doctrines give meaning to the words, the plain English, what they meant to the framers. It did not have any other meaning. They considered joint address, which would have been a remedial reading, and they rejected it.

But let me take you beyond the plain English. Why did the framers reject proposals that the standard be expanded to include maladministration, neglect of duty, and adopt instead—"borrow" in the words of Hamilton—the criminal political standard used in English impeachments, those that resulted in true punishment, treason, bribery, and other high crimes and misdemeanors. If these proceedings were to have none of the characteristics associated with those criminal proceedings, why did the framers include an exception to the general rule, the trial of all crimes, except in cases of impeachment, shall be by jury, unless they understood, in the absence of the exception, these were crimes that would have to be tried by a jury?

You cannot ignore that as surplusage. The established rule, in the presence of an exception, confirms the applicability of the general rule. They understood these were crimes, and that is why they created an exception, to permit them to be tried in the extraordinary process, and these impeachments are merely a remedial proceeding to remove an unfit officer from office; why the permanent disqualification? If cases of impeachment were not to be criminal in nature and the sanction of permanent disqualification was not intended as punishment, why did the framers find it necessary, and what meaning can you give their words, to include a further exception to the power that authorizes the President to grant reprieves and pardons, for offenses against the United States, except in cases of impeachment; why the exception? The President has no power to relieve me from a civil or remedial event. If you enter judgment in court down here for a hundred dollars, the President cannot effect that. The President's power extends to that which is an offense. The exception is this. The framers must have meant something by it.

Presence of the exception confirms the existence of the rule. Most important, the very clause upon which the House relies, in cases of impeachment, are not criminal in nature. In any event, why did the framers conclude that express exception to the general rule was necessary to assure that a party convicted in a case of impeachment will nevertheless be liable and subject to indictment, trial, judgment, punishment according to the law? Why the exception?

We don't need those exceptions. I can be tried by the merit system, if I were a Federal official, and booted out of office. This would be no problem. You wouldn't need exceptions to say that I can also be indicted and tried. The presence of the exception confirms the rule.

The framers knew the difference between a conviction and impeachment. I am now told that the historical evidence suggests, or the House managers urge the historical evidence suggests this is remedial. I have for 25 years, since I went to law school, been told, as have most lawyers and most law students to look at Black's Law Dictionary as the standard to find out what the word means. I went back and looked at Black's Law Dictionary. In fact, my client, who knows these things better than I do, told me to. Impeachment has been defined the same by Black's Law Dictionary for 100 years, and it is the same in the fifth edition. Impeachment is a "A criminal proceeding against a public officer before a quasi-political court instituted by written accusations called articles of impeachment."

How is it that the historical evidence eluded through five editions, in over 100 years, the author and editors of Black's Law Dictionary—I agree with Justice Story. You have the power to try political offenses, but so did Parliament. I agree with Justice Story. There are characteristics in impeachments that are unique, but they were criminal proceedings in England, and they remain criminal in significant respects here.

Mr. President, with what time remains, I will try to respond briefly to a few other points.

The PRESIDENT pro tempore. Counsel is advised that only 5 seconds remain.

Mr. ANDERSON. In the 5 seconds, this is not an attack on Judge Gignoux, but Reid Weingarten, when the man suggests this is a tainted verdict. Reid Weingarten and Robert Richter argued that he was guilty. The jury rejected it.

Mr. MITCHE~~LL~~. Mr. President, I ask unanimous consent that Mr. Anderson be permitted to address the Senate for 2 more minutes, in order to complete his argument.

The PRESIDENT pro tempore. Without objection, it is so ordered. Mr. Anderson may proceed for 2 more minutes.

Mr. ANDERSON. I cannot respond to everything, but there is one thing that deeply concerns me. I respect the managers. They are prosecutors, and they should take the broadest view of their powers and argue it before you. When I have practiced in court, there is something called the "golden rule." It is not for the prosecutor to proclaim the conclusion. This man is presumed innocent, and he is not guilty. When you say this was somehow missed, acting out at trial, a tainted verdict, understand what they are challenging. They are not challenging this man. Former Chief Justice Warren Burger selected the judge who would preside. He selected a distinguished district judge and a member of the Judicial Conference of the United States, Edward Thaxter Gignoux. The public integrity section selected experienced trial lawyers to develop and present the case. Robert Richter has gone on to be a judge. Reid Weingarten has gone into private practice. Those persons, as well as this judge, participated in the selection of that jury, and all were satisfied.

No one questioned the competence of the prosecutors. No one questioned the competence of Judge Gignoux. No one questioned the competence of the jurors. Judge Gignoux, who was a tough judge, knew how to run a courtroom. He knew how to conduct a trial that was fair. He conducted a trial, and the Government has never suggested otherwise. When you say this is a tainted jury verdict, it means that the chief judge of the United States, Chief Justice, cannot properly select a judge who can conduct a fair trial, and given 18 months, the Justice Department cannot put on a prosecution.

Judge Hastings was acquitted. Even if—this is the story of our Nation's life—we grant extra protection to judges, all the facts that have been mentioned, with the exception of the four telephone calls, are facts that Reid Weingarten argued to the jury. There is no new evidence, no new allegations. It was considered by an

American jury, and it was rejected. Too much time has passed. Thank you.

The **President** pro tempore. The additional time has expired.

The Chair thanks the respondent, his counsel, and the managers on the part of the House.

The Chair recognizes the majority leader.

Mr. **Mitchell**. Mr. President, do I understand that the managers would like 2 additional minutes to make a final response?

Manager **Bryant**. Yes.

Mr. **Mitchell**. I ask unanimous consent that the House manager be given additional minutes.

The **President** pro tempore. Without objection, it is so ordered.

Manager **Bryant**. We are very grateful to the President of the Senate for allowing us to speak just briefly.

I would urge each Member of this Senate, if you are not well versed in the procedures of jurisprudence, to speak with your clerks, to speak with any reputable source. No one at any level of jurisprudential activity quotes Black's Law Dictionary as precedent for anything. The idea that it would be quoted on the floor of this Senate in a matter of this magnitude, in my opinion, is reprehensible.

The **President** pro tempore. The Chair recognizes the majority leader.

ORDER FOR CLOSED-DOOR DELIBERATIONS

Mr. **Mitchell**. Mr. President, pursuant to impeachment rule 20 I move that upon the establishment of a quorum tomorrow, pursuant to the previous order providing for a live quorum starting at 2 p.m., the doors of the Senate be closed while the Senate is deliberating upon its decision.

The **President** pro tempore. Without objection, the motion is agreed to.

Pursuant to the previous order, this concludes the Senate consideration today of the articles of impeachment.

The Senate will begin its closed-door deliberations on motions tomorrow at 2:15 p.m., following the live quorum call that shall begin at 2 p.m.

SENATE VOTES ON MOTIONS BY JUDGE ALCEE L. HASTINGS TO DISMISS ARTICLES OF IMPEACHMENT

[From the Congressional Record—Senate, March 16, 1989]

The PRESIDENT pro tempore. The hour of 2 o'clock having arrived, under the order, the clerk will call the roll to establish a quorum.

The assistant legislative clerk called the roll, and the following Senators entered the Chamber and answered to their names:

[Quorum No. 3]

Baucus
Byrd
Cranston
DeConcini
Dixon
Dole
Kohl
Leahy
Metzenbaum
Mitchell
Simon

The PRESIDENT pro tempore. A quorum is not present. The clerk will call the roll of the absentees.

The assistant legislative clerk resumed the call of the roll.

Adams
Armstrong
Biden
Bingaman
Bond
Boren
Bradley
Bryan
Bumpers
Burdick
Burns
Chafee
Coats
Cohen
Conrad
Danforth
Daschle
Dodd
Exon
Ford
Fowler
Glenn
Gore
Gorton
Graham
Grassley
Harkin
Hatch
Hatfield
Heflin
Heinz
Hollings
Inouye
Jeffords
Kassebaum
Kasten
Kennedy
Kerrey
Kerry
Lautenberg
Levin
Lieberman
Lott
Lugar
Matsunaga
McCain
McClure
McConnell
Mikulski
Moynihan
Murkowski
Nunn
Pell
Pressler
Pryor
Reid
Riegle
Robb
Rockefeller
Rudman
Sarbanes
Sasser
Simpson
Specter
Stevens
Symms
Thurmond
Wallop
Warner
Wilson
Wirth

CLOSED SESSION

The PRESIDENT pro tempore. A quorum is present. Under the previous order, as modified, the hour of 2:15 p.m. having arrived and a quorum having been established, the galleries of the Senate shall be cleared and the floor shall be cleared of all unauthorized personnel. The doors shall be closed, and the Senate will deliberate on Justice Hastings' two motions in closed session. The Sergeant at Arms will proceed to clear the gallery.

(At 2:15 p.m., the doors of the Chamber were closed. The proceedings of the Senate were held in closed session until 4:39 p.m., at which time the Senate recessed until 4:50 p.m., whereupon the following occurred:)

The PRESIDENT pro tempore. The Senate will come to order.

Mr. MITCHELL. Mr. President, I suggest the absence of a quorum.

The PRESIDENT pro tempore. The absence of a quorum has been suggested. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. MITCHELL. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDENT pro tempore. Without objection, it is so ordered. There will be order in the Senate. The staff will take their seats.

Mr. Mitchell addressed the Chair.

The PRESIDENT pro tempore. The majority leader is recognized.

Mr. MITCHELL. Mr. President, I ask unanimous consent that the voting records of those Senators who were Members of the House of Representatives during the 100th Congress and who have been excused from voting on all questions during the impeachment trail not be calculated to include any rollcall votes during the trial.

The PRESIDENT pro tempore. Is there objection?

Mr. DOLE. Mr. President, I want to establish, together with the majority leader, the fact that the unanimous-consent agreement on voting records not be a precedent for calculating voting records on any other occasion.

Mr. Mitchell addressed the Chair.

The PRESIDENT pro tempore. The majority leader is recognized.

Mr. MITCHELL. Mr. President, the Republican leader is correct. This agreement is being entered into for the protection of the Senate, not for the protection of individual Senators. It is absolutely essential that the Senate, as an institution, ensure that Judge Hastings receive a full and fair hearing, without even the slightest appearance of a lack of impartiality.

Because four Senators were Members of the House of Representatives when the House deliberated on the Hastings impeachment, some might suggest that an appearance of prejudgment exists. Their excuse from participation is intended to protect against such an appearance. Because the unanimous-consent agreement would serve for this singular purpose, and this purpose alone, there is no basis for using this agreement in the future for the protection of individual Senators for their voting records.

The PRESIDENT pro tempore. Is there objection to the request of the majority leader?

The Chair hears none. It is so ordered.

The Sergeant at Arms will issue the proclamation.

The SERGEANT AT ARMS. Hear ye! hear ye! hear ye! All persons are commanded to keep silence on pain of imprisonment while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives against Alcee Hastings, U.S. district judge for the southern district of Florida.

Mr. Mitchell addressed the Chair.

The PRESIDENT pro tempore. The majority leader is recognized.

Mr. Mitchell. Mr. President, I ask unanimous consent that it be in order to order the yeas and nays on the respondent's two motions at this time, with one show of seconds.

The President pro tempore. Is there objection?

The Chair hears none. It will be so ordered.

Mr. Mitchell. Mr. President, I ask for the yeas and nays.

The President pro tempore. Is there a sufficient second?

Obviously, there is a sufficient second, and the yeas and nays are ordered on both questions.

The clerk will call the roll on the first question, the first question being Judge Hastings' motion to dismiss articles I through XV without trial based upon the 1983 jury verdict and lapse of time.

The legislative clerk called the roll.

Mr. Cranston. I announce that the Senator from North Carolina [Mr. Sanford] is absent on official business.

Mr. Simpson. I announce that the Senator from Minnesota [Mr. Boschwitz] and the Senator from Utah [Mr. Garn] are necessarily absent.

I also announce that the Senator from Indiana [Mr. Coats], the Senator from Vermont [Mr. Jeffords], the Senator from Mississippi [Mr. Lott], and the Senator from Florida [Mr. Mack] are excused from voting.

The President pro tempore. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 1, nays 92, as follows:

(Rollcall Vote No. 22)

(Motion to Dismiss Articles I through XV without trial based on the 1983 jury verdict and lapse of time—Court of Impeachment—Judge Alcee L. Hastings.)

[Rollcall Vote No. 22]

YEAS—1

Metzenbaum

NAYS—92

Adams
Armstrong
Baucus
Bentsen
Biden
Bingaman
Bond
Boren
Bradley
Breaux
Bryan
Bumpers
Burdick
Burns
Byrd
Chafee
Cochran
Cohen
Conrad
Cranston
D'Amato
Danforth
Daschle
DeConcini
Dixon
Dodd
Dole
Domenici
Durenberger
Exon
Ford
Fowler
Glenn
Gore
Gorton
Graham
Gramm
Grassley
Harkin
Hatch
Hatfield
Heflin
Heinz
Helms
Hollings
Humphrey
Inouye
Johnston
Kassebaum
Kasten
Kennedy
Kerrey
Kerry
Kohl
Lautenberg
Leahy
Levin
Lieberman
Lugar
Matsunaga
McCain
McClure
McConnell
Mikulski
Mitchell
Moynihan
Murkowski
Nickles
Nunn
Packwood
Pell
Pressler
Pryor
Reid
Riegle

Robb
Rockefeller
Roth
Rudman
Sarbanes
Sasser
Shelby
Simon
Simpson
Specter
Stevens
Symms
Thurmond
Wallop
Warner
Wilson
Wirth

NOT VOTING—7

Boschwitz
Coats
Garn
Jeffords
Lott
Mack
Sanford

So the motion was denied.

The PRESIDENT pro tempore. The Clerk will call the roll on the second question, Judge Hastings' motion to dismiss article XVII for failure to state a separate impeachable offense.

The bill clerk called the roll.

Mr. CRANSTON. I announce that the Senator from North Carolina [Mr. Sanford] is absent on official business.

Mr. SIMPSON. I announce that the Senator from Minnesota [Mr. Boschwitz] and the Senator from Utah [Mr. Garn] are necessarily absent.

I also announce that the Senator from Indiana [Mr. Coats], the Senator from Vermont [Mr. Jeffords], the Senator from Mississippi [Mr. Lott], and the Senator from Florida [Mr. Mack] are excused from voting.

The PRESIDENT pro tempore. Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 0, nays 93, as follows:

(Motion to dismiss article XVII for failure to state a separate impeachable offense.)

[Rollcall Vote No. 23]

YEAS—0

NAYS—93

Adams
Armstrong
Baucus
Bentsen
Biden
Bingaman
Bond
Boren
Bradley
Breaux
Bryan
Bumpers
Burdick
Burns
Byrd
Chafee
Cochran
Cohen
Conrad
Cranston
D'Amato
Danforth
Daschle
DeConcini
Dixon
Dodd
Dole
Domenici
Durenberger
Exon
Ford
Fowler
Glenn
Gore
Gorton
Graham
Gramm
Grassley
Harkin
Hatch
Hatfield
Heflin
Heinz
Helms
Hollings
Humphrey
Inouye
Johnston
Kassebaum
Kasten
Kennedy
Kerrey
Kerry
Kohl
Lautenberg
Leahy
Levin
Lieberman
Lugar
Matsunaga
McCain
McClure
McConnell
Metzenbaum
Mikulski
Mitchell
Moynihan
Murkowski
Nickles
Nunn
Packwood
Pell
Pressler
Pryor
Reid
Riegle
Robb
Rockefeller
Roth
Rudman
Sarbanes

Sasser
Shelby
Simon
Simpson
Specter
Stevens
Symms
Thurmond
Wallop
Warner
Wilson
Wirth

NOT VOTING—7

Boschwitz
Coats
Garn
Jeffords
Lott
Mack
Sanford

So the motion was denied.

POST-TRIAL BRIEFS AND MEMORANDA SUBMITTED BY THE PARTIES

IN THE SENATE OF THE UNITED STATES
Sitting As A Court of Impeachment

In re)
)
)
IMPEACHMENT OF)
JUDGE ALCEE L. HASTINGS)

EXECUTIVE SUMMARY OF POST TRIAL MEMORANDUM OF THE HOUSE OF REPRESENTATIVES

By an overwhelming vote, the House of Representatives charged United States District Judge Alcee L. Hastings with 17 acts of misconduct. Selling his office for personal gain, fabricating documents to establish his innocence, lying repeatedly under oath at his criminal trial, disclosing confidential wiretap information to an acquaintance -- these are the separate actions over a period of more than four years which compel the conclusion that Judge Hastings should be removed from office.

In this document, the House summarizes its arguments in support of the 17 Articles of Impeachment. For a complete explanation of those arguments and for citations of supporting authority, the House refers each Senator to its complete Post Trial Memorandum.

ARTICLE I: BRIBERY CONSPIRACY

1. The Romano Case

In October, 1979, Alcee L. Hastings was sworn in as a United States District Judge for the Southern District of Florida. One of the first cases assigned to Judge Hastings was that of Thomas and Frank Romano, who had been indicted on 21 counts of racketeering, mail and wire fraud, embezzlement and false tax filings. During the subsequent trial, Judge Hastings learned that the Romanos had looted a construction project of over a million dollars, had frequently made payoffs, and had access to large sums of cash.

In December, 1980, the Romanos were found guilty on all counts. Thereafter, the parties agreed to a bench trial before Judge Hastings on the remaining issue of whether the property connected with the Romanos' racketeering activity should be forfeited. Those hearings were concluded on February 20, 1981, and on May 4, 1981, Judge Hastings entered an order, forfeiting to the U.S. Government approximately $1.16 million of the Romanos' property. On April 23, 1981, the law clerk assigned to the case, Jeffrey Miller, advised the parties that sentencing of the Romanos would take place on May 11, 1981.

In March, 1981, William Borders, a Washington, D.C. attorney, began making inquiries about the Romanos. Borders was a good friend of Judge Hastings and had played a significant role in the judge's appointment to the Federal bench. Borders asked William Dredge, a career criminal who resided in Miami, Florida, to determine whether the Romanos were "stand up" people. Dredge made some inquiries and reported to Borders that the Romanos were trustworthy in the underworld. Borders then asked Dredge to tell the Romanos that there was an attorney in Washington, D.C. who could help them with their case. Dredge passed Borders' message to a business associate of the Romanos, who in turn relayed the offer to the Romanos. The Romanos contacted their counsel, Neal Sonnett, and told him about the offer, which they decided to ignore.

During the spring and early summer of 1981, Borders repeatedly asked Dredge about the Romanos. Although Borders told him that he could do things with the judge, Dredge was skeptical. To put Borders off, Dredge falsely claimed that he had talked to the Romanos, that they were not interested, and that they had already paid $50,000 for help from the judge. Borders responded that this was impossible because only he could do business with Judge Hastings. In fact Dredge heard nothing from the Romanos after relaying the initial message in early April. However, because he knew he had his own problems, Dredge continued to tell Borders that he was in touch with the Romanos.

On Sunday, May 10, 1981, Dredge was arrested in Florida and charged with narcotics violations in Maryland. On the morning of his arrest, Dredge had a telephone conversation with William Borders. Borders told him that the Romanos were to be sentenced by Judge Hastings the next day, that the sentencing would be continued by the judge and, if the Romanos did not come up with the money, the next time the "hammer would fall." The next day Judge Hastings continued the sentencing as requested by the defendants. On May 12, Borders called Dredge and told him of the continuance. The fact that Borders knew in advance that the sentencing would be continued convinced Dredge that the bribery scheme was for real.

On June 19, 1981, a panel of the Fifth Circuit handed down the Martino decision, which had important implications for the Romano forfeiture order previously entered by Judge Hastings. Accordingly, the parties briefed the issue prior to July 8, 1981, the new date set for sentencing and argument on pending motions. At the hearing, the forfeiture issue was argued extensively with Judge Hastings stating that he had read the briefs and that he was familiar with Martino. Notwithstanding that controlling case, he reaffirmed his order of May 4, 1981, and stated that a brief written order would follow, addressing the new case.

Judge Hastings then sentenced each of the Romanos to three years in prison. The prosecutor was surprised by the stiff sentences because both Romanos were elderly, in poor health, and had no other criminal convictions.

2. The Undercover Investigation

On June 3, 1981, Santo Trafficante, reputed crime boss of southern Florida, was indicted in Miami on racketeering charges. The case was assigned to Judge Hastings. In July, 1981, both Trafficante and Dredge were house guests of Joseph Nesline, a Washington gambler who had introduced Dredge to William Borders. While there, and during a second visit later that month, Dredge learned that Borders was also soliciting a bribe from Trafficante.

Shortly thereafter, on July 20, 1981, Dredge advised the United States Attorney's Office in Miami that he had information concerning a bribery scheme involving Judge Hastings, Santo Trafficante and a prominent Washington, D.C. lawyer. In return for this information, Dredge wanted the drug charges pending against him in Maryland dismissed. Dredge said that the lawyer (later identified as Borders) was coming to Miami the next day to meet with Trafficante. He also revealed the proposal to solicit a bribe from the Romanos, the essence of which was that for $150,000 their sentences would be reduced to probation.

The following day, Borders was identified at the Miami airport and followed by the FBI. At the Fontainebleau Hotel, Borders met with Trafficante for 15 to 20 minutes. As they parted later, Trafficante was overheard telling Borders, "good job."

Dredge continued to be debriefed by the Government concerning his knowledge of the bribery schemes. He stated that as proof to the Romanos that he was the only person connected to Judge Hastings, Borders had offered to have the judge show up at a prearranged time and location. Dredge also stated that Borders was coming again to Miami to meet with Trafficante or Judge Hastings. Thereafter, Borders flew to Miami and was once again observed in a clandestine meeting with Trafficante.

Having twice corroborated Dredge's statements regarding Borders and Trafficante, the Government attempted to enlist Dredge's cooperation. Because of justifiable fears for his safety, Dredge refused to cooperate in an investigation of the Trafficante bribery deal. Dredge was willing, however, to introduce Borders to an undercover agent posing as one of the Romano brothers.

Dredge told Borders in late August that the Romanos were showing interest in the bribery scheme. On September 10, 1981, in the presence of the FBI case agent, Dredge telephoned Borders and told him that the Romanos were ready to make a deal. Arrangements were made for Dredge to meet Borders at the Miami airport on September 12 at 8:00 a.m., and introduce him to "Frank Romano," who was to be impersonated by retired FBI agent, H. Paul Rico.

Over the next month, Rico and Borders met three times. They negotiated the terms of the bribery scheme, which included both the payment of the bribe and two shows of proof that Borders could deliver Judge Hastings.

3. Offers of Proof and Compliance.

Borders made three separate "offers of proof" to persuade the Romanos that Judge Hastings was participating in the bribery scheme. The first offer was made to Dredge with regard to the May 11 continuance. The second two were made to Rico in their first meeting on the bribery scheme. In each instance Judge Hastings took the promised action. Each offer of proof involved actions that only the judge could take. In each case the promised conduct was not the subject of public knowledge. And, each time the only reasonable explanation of Borders' ability to accurately predict the judge's conduct is that Judge Hastings was a co-conspirator.

a. The May 11 Continuance.

The first offer of proof was Borders' promise to Dredge that Judge Hastings would continue the sentencing scheduled for May 11, 1981, in order to give the Romanos one last chance to take advantage of the bribery deal. The sentencing was then continued.

Judge Hastings does not deny that Borders may have told Dredge that sentencing in the Romano case would be continued. But he belittles the significance of the continuance. First he argues that Dredge did not meet Borders until May and, therefore, Dredge must have been referring to the July sentencing, which was not continued. The evidence, however, establishes that Dredge met Borders early in the spring of 1981. Dredge has testified to that effect. In Borders' appointment book Dredge's number is found in the space for the week of March 30. And Dredge's April contact with the Romanos, through their business associate, is corroborated by the testimony and contemporaneous memo of their attorney, Neal Sonnett. Further, Dredge had good reason to remember the date on which he spoke to Borders about the sentencing. May 10, 1981, was the day that he was arrested on the pending Baltimore drug charges.

Judge Hastings also argues that he did not initiate the continuance and, therefore, was not part of the deal. But the important fact is that Borders had any information at all about the postponement of the Romanos' sentencing. There had been no filing of a written motion for a continuance; the consideration of a continuance was not public information. The only persons other than the judge who would have reason to know about a possible postponement -- Sonnett, his staff, and the judge's staff -- have denied providing this information to Borders, and the judge has not suggested otherwise. And, Sonnett may have orally notified chambers on May 8, 1981, of his desire for a continuance, thereby allowing Judge Hastings to inform Borders.

The important fact is that Judge Hastings decided in advance of the hearing that there would be a postponement of the sentencing and he shared that information with William Borders. Judge Hastings' precipitous conduct at the beginning of the May 11 hearing supports this conclusion. The transcript shows that instead of first addressing the pending motions for a new trial or judgment of acquittal, he immediately proceeded to sentencing, which would be moot if either motion were granted.

b. The September 16 "show" at the Fontainebleau.

At their first meeting on September 12, Borders and Rico agreed that before any money was paid in the bribery deal, Borders would provide proof of his control of Judge Hastings by having him appear on a certain date at a time and place to be named by Rico. Rico asked Borders if he needed to let him know when the judge would be available. But Borders did not need to check with the judge. He immediately chose the following Wednesday, September 16. Rico then chose the main dining room of the Fontainebleau Hotel at 8:00 p.m.

Borders' ability to immediately set a date is the first indication that this offer of proof was made with Judge Hastings' complicity. Given Judge Hastings' heavy travel schedule, it would have been foolhardy for Borders to make such a promise without knowing the judge's availability. The judge travelled extensively -- he had speaking engagements and professional commitments all over the country. The House submits that Judge Hastings met with Borders to discuss in advance this show of proof and other aspects of the bribery scheme at Washington National Airport the night before Borders first met with Rico.

Judge Hastings denies meeting with Borders on September 11, but the facts supporting such a conclusion are overwhelming: 1) their original travel plans for that day were juxtaposed so that there was an hour and a half overlap between the time Judge Hastings was to arrive at National and the time Borders was to leave from there for Miami to meet Rico; 2) the judge called Borders twice that afternoon to advise him that his flight had been delayed; 3) Borders took a later flight than the one which he had reserved, providing once again an hour and a half overlap at the airport; and 4) there was a delay of over two hours between the time the judge arrived at National and his check-in at the Sheraton Hotel. Having met with Judge Hastings to discuss the bribery deal, Borders was able to promise Rico the next morning that Judge Hastings would "show" on the evening of September 16 to prove his involvement in the bribery scheme.

After the meeting with Rico, Borders needed to talk to the judge again, this time to report the details of the plan. He did so by immediately returning to Washington, D.C. to see the judge. Like the meeting at National, the meeting between Judge Hastings and William Borders on the night of September 12 at the Sheraton Hotel was not happenstance -- it was planned in advance.

There were five people in Judge Hastings' room on the night of September 12. With the sole exception of Judge Hastings, they all remember that they were sitting around that evening waiting.

One woman, Donna Mendez (now Donna Myrill), specifically remembers that they were waiting for William Borders, whom she knew. Certainly all of the circumstances of the events that evening support the conclusion that Judge Hastings and Borders had planned to meet. First, Judge Hastings was not surprised when Borders appeared at his door at 10:00 p.m. Second, the group had gathered for the purpose of having dinner, and yet at 10:00 p.m. there had been no move to go to dinner. The group went to the dining room almost immediately after Borders arrived. Third, Borders cut short his stay at a long planned family reunion in Fort Pierce, Florida and made almost Herculean efforts to return to Washington. The only apparent reason for his return was to see Judge Hastings, and it is incredible that he would have gone to so much trouble without knowing that he would find the judge at his hotel that Saturday night.

Four days later, on September 16, Judge Hastings made good on Borders' promise to Rico that the judge would appear at 8:00 p.m. at the Fontainebleau Hotel. Judge Hastings arrived promptly and dined in the main dining room with a friend, Essie Thompson. Nothing in his conduct that night or in the events leading up to the dinner corroborates Judge Hastings' contention that he went to the Fontainebleau because Borders had asked him to meet him there. Indeed, many of his actions were totally inconsistent with that premise.

Not once did he mention William Borders in connection with that dinner to Ms. Thompson. When they were seated at a table for four, the extra places were promptly removed. Judge Hastings, who had made reservations for two, did not object. Nor did Judge Hastings page Borders, stop at the main desk to see if he had checked in, or look for him in the other restaurants at the hotel.

On September 16, Borders was in Las Vegas attending a championship fight. If Judge Hastings was not part of the bribery deal as he argues, Borders would never have risked asking the judge to meet him at the Fontainebleau on an evening when Borders would be in Las Vegas. Borders' plans were known to his friends and colleagues, and could have easily been learned if Judge Hastings had called Borders' office, as he often did.

c. The October 6 Romano forfeiture order.

The third offer of proof involved the Romano forfeiture order. At each of his meetings with Rico, Borders promised that within ten days of a down payment on the bribe, Judge Hastings would issue an order returning a substantial amount of the Romanos' property which had previously been forfeited. That order would be a second sign that the judge was on board. Again, Judge Hastings performed as promised, for on October 6, 1981, he signed an order returning over $845,000 of the $1.16 million previously forfeited property.

This offer of proof illustrates William Borders' detailed knowledge the Romano case. Borders knew that a large amount of the Romanos' property had been forfeited. He promised that part, rather than all, of that property would be returned. He predicted that the portion returned would be substantial. And Borders knew that the order would be issued shortly.

The very terms of this offer indicate that Judge Hastings had provided Borders with information about the Romano case. There is no evidence that Borders had a source other than Judge Hastings for this information. Although the court files were open to the public, in 1981 those files were kept in the individual judge's chambers and were available only by making a request of the judge's staff. Neither Borders nor his representative ever made such a request. The judge does not argue otherwise.

Judge Hastings suggests that security in the courthouse was quite lax, implying that Borders might have gained access to the files without staff knowledge. He also presented evidence that many lawyers were interested in the Romano case and might have called inquiring about it, again without staff knowledge of who was actually making the inquiry. There is no support in the record for either of these theories, beyond Judge Hastings' testimony.

In any case, these arguments are irrelevant. Public facts were limited to the previous May 4 forfeiture order. Other detailed information would be available to only a few people in chambers and disclosure would require a conscious decision on the part of the staff member, which they deny.

Judge Hastings' conduct with regard to the October 6 forfeiture order coincides precisely with other events in the Romano bribery scheme, providing further evidence that he conspired with Borders. A $25,000 down payment on the bribe was paid at the second Borders/Rico meeting on September 19. Rico called Borders on the afternoon of Friday, October 2 and informed Borders that he had not received the order which was to have been issued by September 29. Within two hours, Borders called Judge Hastings, but the judge had left for the day. When Rico called again on Sunday morning, Borders said that he had not been able to find out yet because he could not talk to anybody. That Sunday afternoon, Borders again tried to reach Judge Hastings, leaving a message at the judge's home. The very next morning Judge Hastings told his law clerk, Jeffrey Miller, that he wanted the Romano order done that day. That afternoon Borders assured Rico that the order had been taken care of.

Judge Hastings does not deny this incriminating evidence. His explanation is that he was anxious to have the matter finished because Miller would be leaving by the end of the month. But Miller was not scheduled to leave for another four weeks, and the judge's travel schedule had him in Miami for half of the work days in October 1981. Therefore, there was ample opportunity for the judge to sign the order significantly in advance of Miller's planned departure. Further, Miller was responsible for other complicated matters but they were not treated with the urgency given the Romano forfeiture order.

It was also unusual for Judge Hastings to demand that an order, especially a complicated one, be finished on the same day. Moreover, his communications with staff concerning the order created a sense of urgency that it be completed and sent out as quickly as possible. The courtroom clerk testified that Judge Hastings apologized to the staff for the rush, stating that the order had to get out that day. Indeed, the clerk was so impressed with the urgency of the matter that she sent the order special delivery.

Finally, there are no facts that innocently explain the manner in which the October 6 forfeiture order was issued. Nothing had happened in the Romano case in late September or early October to warrant urgency. No further briefs were submitted; nor was there further argument. There was no legal deadline for the order. Nonetheless, the order was issued as promised.

4. More examples of Judge Hastings' complicity.

In addition to the three offers of proof, there is other conduct by Judge Hastings that can only be explained by his participation in the bribery conspiracy. Three events, in particular, stand out.

a. The April 9 Pay Phone Call.

The House submits that on April 9, 1981, Judge Hastings made a pay telephone call to William Borders as part of the bribery scheme. The call was made from a pay phone in the Miami Federal courthouse (100 feet from Judge Hastings' chambers) to a pay phone in the District of Columbia Federal courthouse. It occurred near the time of significant events in the Romano bribery scheme. And, it has no innocent explanation.

William Borders met William Dredge in March of 1981 and by early April had asked Dredge to convey to the Romanos that he could help them with their pending case. Sometime during the week of April 7, the Romanos were contacted and told that there was a

Washington attorney who could help them. And, on April 8, the pleadings on the forfeiture issue were submitted. The very next day, on April 9, Judge Hastings called William Borders. He left a message that Borders should call between twelve and one that afternoon. At 12:15 p.m., the pay phone to pay phone call was made and charged to the judge's home number.

Judge Hastings does not deny that he made the call, although he claims to have no recollection of it. He initially suggested that the call may have been made on the spur of the moment on his way out, but on further questioning he admitted that a call from a pay phone to another pay phone would have to be prearranged.

Judge Hastings admits that the call may have been placed in response to a request by William Borders that the judge go out to a pay phone and call him back. The judge, however, cannot explain why he would act in such a bizarre manner. The judge testified to concerns that the courthouse phones might be tapped. But those suspicions had not arisen in April of 1981. Moreover, what topic could he have been discussing which would require such secrecy, except for the bribery scheme?

b. The October 5 Coded Conversation.

The second example of incriminating conduct by Judge Hastings also involves communication with William Borders by telephone -- on October 5, 1981. Judge Hastings argues that the topic of this conversation concerned his writing letters to solicit financial contributions and support for the bar reinstatement efforts of their mutual friend, Hemphill Pride. Pride had been indefinitely suspended from the South Carolina bar because he had been convicted of misusing funds in a federally subsidized housing project. According to Judge Hastings, he was calling Borders to get information on Pride's financial status so that he could draft letters on Pride's behalf. The evidence, however, is overwhelming that the conversation is not about "letters for Hemp." Rather it is about the bribery scheme.[1]

First, one must consider the testimony of Dr. Roger Shuy, an acknowledged expert in linguistics and conversation analysis. Applying standard analytical linguistic procedures, Dr. Shuy examined the October 5 conversation and concluded that it is in code. Dr. Shuy found three characteristics associated with coded conversations in the October 5 conversation: 1) the use of pause fillers, repeated words, and false starts around topic words in the conversation; 2) numerous logical inconsistencies; and 3) repeated confirmations of understanding. The clustering of these three characteristics in this brief conversation indicates that the conversation is in code. In comparison, the conversation between Judge Hastings and William Borders just three days later has virtually no linguistic indicators of code even though the conversation is twice as long.

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[1] The text of the conversation is as follows:

WAB: Yes, my brother.
ALH: Hey, my man.
WAB: Um hum.
ALH: I've drafted all those, ah, ah, letters, ah, for Hemp . . .
WAB: Um hum.
ALH: . . . and everything's okay. The only thing I was concerned with was, did you hear if, ah, you hear from him after we talked?
WAB: Yea.
ALH: Oh. Okay.
WAB: Uh huh.
ALH: Alright, then.
WAB: See, I had, I talked to him and he, he wrote some things down for me.
ALH: I understand.
WAB: And then I was supposed to go back and get some more things.
ALH: Alright. I understand. Well then, there's no great big problem at all. I'll, I'll see to it that, ah, I communicate with him. I'll send the stuff off to Columbia in the morning.
WAB: Okay.
ALH: Okay.
WAB: Right.
ALH: Bye bye.
WAB: Bye.

Likewise, a common sense analysis by non-experts leads to the very same conclusion -- the conversation makes no sense on its face. Judge Hastings allegedly made this call for the purpose of getting information, specifically an update on the financial status of Hemphill Pride. He does not get the information, and instead is told that Borders will go back to Pride to get some more "things." Nevertheless, he concludes that there is "no great big problem" and he can send the letters to Columbia. Judge Hastings suggests that the reason he did not pursue the specific information for which he had called was that he was already beginning to waver in his decision to write the letters on behalf of Pride. There is nothing, however, in either the content or tone of the conversation to suggest the slightest hesitation by Judge Hastings.

The conversation is also unusual in several other respects. It does not have any of the congenial, social "patter" that one would expect from Judge Hastings: there is virtually no greeting;

there is no mention of the upcoming celebration in Borders' honor later that week in Washington; there is no discussion as to whether the judge, a sponsor of the event, would finish the trial he was then presiding over in time to attend the festivities.

Finally, if the conversation were about "letters for Hemp," one would expect corroborating facts independent of the conversation itself. Except for the existence of the purported draft letters, there are none. Indeed, all of the extrinsic evidence is contrary to the purported content of the conversation.

For example, according to Judge Hastings, he was referring to Pride when he asked if Borders had spoken to "him" since the judge and Borders had talked. According to Judge Hastings, that would mean after September 20 or 21. Borders responds that he had. But there is no evidence of any such contact. Further, Pride testified unequivocally that he did not write anything down for Borders at any time in the fall of 1981. Nor was he supposed to provide supplemental "things" for Borders. Indeed, Pride testified he was totally unaware of the letters of support, nor would he have wanted any.

Likewise, there are no independent facts to corroborate Judge Hastings' statement that he would send the letters out the next morning. Not only did Judge Hastings not send the letters out the next day as promised, he did not even follow his usual practice and give them to his secretary to type. The judge explained that he decided overnight that to send the letters would violate the Judicial Canons of Ethics. But he did not throw the drafts away, nor did he advise Borders of his new decision. According to Judge Hastings, Borders had hounded him about preparing these letters for months. Yet, having led Borders to believe that they would go out the next day, the judge did not even call Borders back. Nor did he mention his change of heart when speaking to Borders three days later on October 8. Nor, when he spent the better part of the morning with Borders on October 9.

Judge Hastings' true purpose in calling Borders on the afternoon of October 5 was to confirm that the bribery deal was still on in spite of the fact that the forfeiture order had not been issued within the time frame promised by Borders. The House submits that on Sunday, October 4, Borders finally reached Judge Hastings after leaving a message at his home, and reported that Rico was putting pressure on him about the order. Judge Hastings must have assured Borders that he would take care of it right away, for the next morning Judge Hastings instructed his law clerk to do the Romano order that day. Borders then told Rico on Monday afternoon that the order had been taken care of. Forty minutes later, Judge Hastings placed the call which resulted in the coded conversation. Having been told by Rico, in effect, that the deal was still on, Borders was then able to tell Judge Hastings that he should go ahead and send out the order.

As a result of the October 5 conversation Judge Hastings issued the Romano forfeiture order on October 6. Two days later, when Rico inquired again about the order, Borders was able to say, it "went out yesterday morning" -- his information coinciding exactly with Judge Hastings' promise on October 5 that he would send the "stuff" out "in the morning."

With respect to the draft letters themselves, there is overwhelming evidence that they were fabricated by Judge Hastings to bolster his defense. The timing of the letters' production to the Government -- ten months after a discovery order required their production and only one month before Judge Hastings' criminal trial -- sets the stage of suspicion. The judge also admits that as early as December, 1981, near the time of his indictment, he knew that the draft letters would be critical to his explanation of the October 5 call, yet neither in December, January nor February did he show the drafts to his principle counsel.

c. October 9, 1981.

The third compelling indication of Judge Hastings' guilt is the circumstances surrounding his departure from Washington, D.C. on October 9, 1981. Shortly after 2:45 p.m. on that day, while at the L'Enfant Plaza Hotel, Judge Hastings learned that Borders had been arrested for bribery in connection with the judge's court and that the FBI wanted to interview him. Judge Hastings did not call the agents as they had requested. Instead he packed his bags and fled the hotel. He did not check out, he did not pay his room service charges, he did not pick up the suit which he had left with the valet service. Although he had no airline reservations for that afternoon, he did not call and attempt to find out what was available. Instead he simply got into a cab and asked to be taken to Baltimore Washington International airport.

Judge Hastings has offered a series of explanations for his behavior. He did not check out because he thought he was not responsible for the room charge. He gave Hemphill Pride $100 to cover the room service and valet charges. He took an hour long, $50 dollar cab ride to BWI because he thought all of the planes from National went through Atlanta.

Once again, none of the judge's explanations are corroborated by the evidence. The L'Enfant Plaza did not provide the room free of charge. Pride denies that Judge Hastings gave him money or said anything about paying the judge's incidental expenses. There was a non-stop flight from National Airport to Miami at 4:35 p.m. that afternoon (with seats available) -- a flight which Judge Hastings had taken just two months earlier.

The crux of Judge Hastings' explanation of his hasty departure, however, is that he was concerned for his mother's welfare. He testified at his criminal trial that he called his mother from the hotel and found that she was hysterical because of the onslaught of the media. But once again the facts contradict his account.

In the first place, there is no documentary evidence that Judge Hastings called his mother that afternoon from the L'Enfant Plaza. No such charges are reflected in the computerized hotel telephone bills for that day nor in any other telephone records. The first documented conversation between Judge Hastings and his mother was not until 4:37 p.m., when the judge called from BWI, having already fled Washington. Further, Pride testified that he was with Judge Hastings from the time the judge learned of Borders' arrest until he left the judge in the hotel lobby, and no calls were made.

Second, Judge Hastings' conduct does not reflect an eagerness to get home to Florida so much as a need to get away from the L'Enfant Plaza, the place where the FBI might come looking for him. One would expect that the first act of an experienced traveler who learned that he had to leave Washington, D.C. unexpectedly would be to call the airlines. After all, Friday afternoon is a busy travel time, when one might expect to find flights booked. But Judge Hastings did not take the time to make such a call. Instead he rushed from the hotel, located just 10 minutes from National, and took a $50 cab ride to BWI.

Judge Hastings arrived at the airport around 4:30 p.m. However, he did not make a reservation to return to Florida until an hour later, after conducting a series of calls to Patricia Williams from different pay phones. Upon arriving in Florida, Judge Hastings deplaned in Fort Lauderdale and rented a car rather than flying on to Miami where his car was parked. He went immediately to the home of Patricia Williams where, at around midnight, the FBI found him and conducted an interview. The House submits that the actions of Judge Hastings on the afternoon of October 9 were not those of a man eager to get home to his mother. They were the actions of a man who was part of the bribery scheme and was not ready to face the FBI.

6. Contacts and Relationship Between Judge Hastings and William Borders

Throughout 1981, as the Romano case proceeded and during the Government's investigation of the bribery scheme, there were numerous contacts between Judge Hastings and William Borders. The contacts are documented by telephone and airline records, message logs and by Judge Hastings' own testimony. The contacts were often of brief duration, sometimes at odd hours and on at least one occasion from and to pay telephones.

Analysis of these contacts reveals that most occurred on or close to days on which (a) Judge Hastings had motions in the Romano case under active consideration, (b) he held hearings relating to the Romanos' forfeiture or sentencing, or (c) William Borders was negotiating the deal with Rico. The significant contacts are listed at pages 39-42 of the House post trial memorandum. In addition, attached hereto is a Master Chronology and charts for September and October, 1981, which graphically illustrate the correlation between events in the Romano case, events of the bribery conspiracy and contacts between Judge Hastings and Borders throughout the relevant time period.

Judge Hastings attempts to explain away the incriminating contacts by giving after-the-fact explanations that are wholly unpersuasive and at times implausible. For example, he claims that every time he spoke to William Borders in 1981, they discussed Hemphill Pride and their plan to try to help him financially and professionally. Yet not once between February and October, 1981, when all the telephone calls occur, did Judge Hastings or Borders take any concerted action to help their mutual friend. According to the judge, in many of the calls, Borders was pestering him to write letters in Pride's support. Yet, not until October 5 -- eight months after the calls began -- are the letters allegedly written and even then the judge failed to send them out.

Knowing that this explanation does not wash, the judge provided other reasons why he and Borders were so closely allied. He emphasizes that they were both members of the National Bar Association and, therefore, had spoken about upcoming events. But as one of Judge Hastings' own witnesses explained, the Judicial Council section of the NBA to which Judge Hastings belonged is an autonomous section of the organization. As President of the NBA, Borders would not have regular interaction with those in the Judicial Council.

Even if Judge Hastings and Borders were in contact about NBA events, the schedule of those events -- in February, May and July, 1981 -- does not closely correspond to the calls made in those months and fails to explain the other significant telephone calls during the course of the bribery conspiracy. In addition, Judge Hastings gives no explanation why his messages for Borders would be "urgent" if only an NBA matter was on his mind.

Moreover, the pattern of contacts correlating with key events in the bribery scheme must be viewed in context: there is little evidence of any other contacts between these men during this period. These men would meet or telephone one another only for a specific purpose. The House submits that this purpose was to plot the selling of Judge Hastings' power over criminal defendants.

The bribery conspiracy is further borne out by the continuing relationship between Judge Hastings and Borders. According to Judge Hastings, the ordeal that began for him on October 9, 1981, and which has endured to this day, was the result of a betrayal by his ally of many years, William Borders. If this were the case, one would expect the victim of this plot to harbor some sense of anger, if not outrage, towards his tormentor. Yet, events speak otherwise.

This evidence starts at the moment Judge Hastings learned of Borders' arrest. Judge Hastings expressed no anger about Borders to anyone that day -- neither to Pride, who gave him the news, or to his mother, whom he claims to have called from the L'Enfant Plaza.

Three days later, on October 12, 1981, Judge Hastings called Borders' home. He claims now that he called at the request of his mother to speak to Borders' mother and express Mrs. Hastings' condolences. The mothers, however, did not know each other, nor did the judge know Mrs. Borders well.

Judge Hastings' inexplicably solicitous attitude towards Borders continued before the Impeachment Trial Committee. In his testimony Judge Hastings was quick to angrily denounce the FBI, the Department of Justice, the Eleventh Circuit Investigating Committee, the House of Representatives, Hemphill Pride, William Dredge, and others. But it was not until pressed by the Vice

Chairman of the Committee that he voiced anything against William Borders, the man who should be his nemesis. Moreover, neither in the House nor Senate did Judge Hastings ask that Borders be called to testify, citing his concern for Borders' safety. Yet Borders, in his refusal to testify never raised the issue of safety. Indeed, in the Senate, Borders expressly refused to adopt this position, relying instead on various constitutional claims.

7. Conclusion

In conclusion, the House urges the Senate to consider one aspect of William Borders' behavior -- the solicitation of a bribe from Santo Trafficante. In arguing his innocence, Judge Hastings puts forth a "rainmaking" defense. He states that Borders was taking advantage of him, claiming that he could control Judge Hastings when, in fact, he had no such control. The House submits that this argument is not only unsupported, but, more importantly, ignores reality. In addition to the facts argued above, which illustrate Judge Hastings' active participation in the conspiracy, there is the undeniable fact that to "scam" Santo Trafficante would be extremely dangerous. Without exception, witnesses who knew Trafficante testified before the Impeachment Trial Committee that a person who attempted to defraud him would be in a dangerous situation. That Borders would take such risks by making promises of favorable treatment by Judge Hastings that he could not guarantee is incredible.

ARTICLES II - XV: FALSE TESTIMONY AT TRIAL

Following William Borders' arrest on October 9, 1981, a grand jury in the Southern District of Florida began hearing evidence on the bribery conspiracy. On December 29, 1981, an indictment was returned charging William Borders and Judge Hastings with conspiracy and obstruction of justice.

Pursuant to a reciprocal discovery order, the prosecution produced in January 1982 various documents including the tapes of the intercepted telephone calls between Judge Hastings and Borders. Therefore the judge was aware at the time of his first production of documents in February, 1982 that the subject of the October 5, 1981, taped conversation, purportedly the "letters for Hemp", was critical to his defense. At that time, he did not produce any letters or drafts of letters about or to Hemphill Pride.

Because of a motion to dismiss filed by Judge Hastings, the trial judge severed Judge Hastings' trial from that of William Borders. Borders was tried in Atlanta, Georgia from March 22 until March 29, 1982, and convicted on all counts. Neither Borders nor Judge Hastings testified. One of Judge Hastings' defense counsel, however, did attend the trial, thereby enabling the judge to gain a preview of the Government's evidence.

Following the rejection of his motion, Judge Hastings' case was set for trial. Approximately one month before trial, on December 13, 1982, Judge Hastings (now represented only by himself and Patricia Williams) for the first time disclosed to the prosecution the "letters for Hemp," which consisted of three yellow legal pad sheets, comprising three handwritten letters. The prosecution submitted the letters to forensic experts, who concluded that the paper and ink employed were such that it was impossible to date the writing of the letters.

Judge Hastings' criminal trial, conducted in Miami, Florida, began on January 19, 1983 and continued for 12 days. Judge Hastings took the stand as the final witness in his defense. On February 4, 1983, the jury acquitted Judge Hastings. The House of Representatives contends that the acquittal was obtained through fraud, in that respondent testified falsely about key events related to the bribery scheme.

Three times Judge Hastings unequivocally denied that he participated in a conspiracy with William Borders. Eleven times, Judge Hastings knowingly lied under oath about particular evidence in an attempt to hide from the jury his participation in the bribery scheme. Judge Hastings testified as follows:

> 1. He was surprised by Borders' arrival at his room at the Sheraton Hotel on September 12, 1981.
>
> 2. He expected to meet Borders at the Fontainebleau Hotel on September 16, 1981.
>
> 3. On October 5, 1981, he told his law clerk to prepare the order in the Romano case primarily because the law clerk would be leaving his employment shortly.
>
> 4. His October 5, 1981, telephone conversation with William Borders was about writing letters for Hemphill Pride rather than about the conspiracy to solicit a bribe in the Romano case.
>
> 5. The "letters for Hemp" were written on October 5, 1981.

6. On May 5, 1981, he talked to Hemphill Pride by placing a telephone call to 803-758-8825 in Columbia, South Carolina.

7. On August 2, 1981, he talked to Hemphill Pride by placing a telephone call to 803-782-9387 in Columbia, South Carolina.

8. On September 2, 1981, he talked to Hemphill Pride by placing a telephone call to 803-758-8825 in Columbia, South Carolina.

9. The telephone number 803-777-7716 was a number where Hemphill Pride could be reached in July, 1981.

10. On the afternoon of October 9, 1981, he called his mother and Patricia Williams from his room at the L'Enfant Plaza Hotel, and the information he learned from those phone calls caused him to leave Washington, D.C.

11. He took a plane from BWI rather than National because he did not think there were direct flights to Miami from National at that time.

Articles II through XV charge each of the 14 instances in which Judge Hastings knowingly lied to the jury about his participation in the bribery scheme. Each false statement addressed critical incriminating evidence. With the exception of those statements relating to the telephone calls to South Carolina, a summary of the facts in support of the false statement articles has been set forth above.

The facts pertaining to Articles X through XIII are as follows. At the conclusion of Judge Hastings' direct examination at his criminal trial, Patricia Williams handed the judge various telephone records and asked him to identify four long distance calls that had been highlighted by check marks. In response, Judge Hastings testified that three of the designated calls were ones he had made to Pride, and that the fourth call was made by William

Borders to a place where Judge Hastings knew Pride could be reached.

There is absolutely no dispute that Judge Hastings' testimony was untrue. Not one of the four phone calls was made to Hemphill Pride or to a place where Pride could be reached. Rather, the identified numbers belonged to a business contact of William Borders, a social acquaintance of Judge Hastings (who was called twice) and Patricia Williams' former mother-in-law. Judge Hastings contends, however, that he did not knowingly testify falsely about the calls. According to the judge, despite the fact he had a year to prepare for trial, he just made a mistake.

The four calls allegedly made to Pride are critical because, aside from the fabricated letters themselves, they are the only documentary evidence in support of the judge's defense that he and Borders were intimately involved in Pride's problems. Judge Hastings knew he had to refute the Government's argument that the October 5 conversation between himself and Borders was a coded exchange about the conspiracy. He knew that there would be no testimonial evidence besides his own self-serving claims that his frequent contacts with Borders were about Hemphill Pride. Moreover, Judge Hastings knew that the record would be devoid of any evidence that his alleged strategy calls with Borders resulted in any action to benefit Pride. In short, he needed documentary evidence to bolster his claim.

The facts pertaining to the call made to the former mother-in-law of Patricia Williams, Judge Hastings' own defense counsel, illustrate most graphically Judge Hastings' knowingly false testimony. The judge asks the Senate to believe that both he and Ms. Williams made an innocent mistake about an 18 minute telephone call from Ms. Williams' home, to a number that Ms. Williams had called 14 different times during the two and one-half years prior to Judge Hastings' trial.

The unequivocal, definitive manner of his testimony provides further evidence that Judge Hastings knew he was lying. Indeed, Judge Hastings' testimony at his criminal trial about these calls suggests that he had corroborated his information. For example, the judge testified as follows:

MS. WILLIAMS:	And to whom was that call placed?
JUDGE HASTINGS:	I know for a fact that this particular call was placed to Hemphill Pride.
MS. WILLIAMS:	Did you speak with Hemphill Pride?
JUDGE HASTINGS:	I certainly did.

Finally, it must be emphasized that even if Judge Hastings failed to inquire as to whether the four phone calls were actually to his friend Hemphill Pride -- either by asking his own counsel, the telephone company, Pride or consulting his own personal listing of telephone numbers -- that does not constitute an adequate legal excuse to the charges contained in Articles X through XIII. While mere negligence may not rise to the level of intent required by the element of "knowingly" testifying falsely, courts have held that when a "defendant deliberately closes his eyes to what would otherwise have been obvious to him," the trier of fact may infer "willfulness." Judge Hastings' knowledge of the falseness of his testimony and intent to mislead the jurors may be inferred from his willful blindness to the existence of certain facts.

The final issue with respect to Articles II through XV is the impact of Article I on them. The House submits that a decision that the evidence is insufficient to convict on Article I would be dispositive of some, but not all, of the false statement articles. With respect to Articles VI and X through XV, an acquittal vote on Article I is clearly not dispositive, for these seven false statement articles are independent of Article I and require separate, thorough consideration.

ARTICLE XVI: DISCLOSURE OF CONFIDENTIAL INFORMATION

Two and a half years after his criminal trial on the bribery conspiracy, Judge Hastings committed a wholly separate impeachable offense, related to his earlier acts of conspiracy and false testimony only in that his reprehensible behavior emanated from the same callous disregard for the law.

In September, 1984, the FBI began an undercover investigation to explore union corruption on the Miami docks. By mid-1985, an informant, Johnny Rivero, had confirmed corruption within the union and had also reported corruption in zoning matters in the city of Hialeah and police involvement in the importation of illegal drugs in North Bay Village, Florida.

In connection with these investigations, on July 15, 1985, Assistant United States Attorney Roberto Martinez applied to Judge

Hastings, the duty judge for that month, for an authorization to institute a wiretap. It was confidential information Judge Hastings learned through his supervision of this wiretap that he is charged with having disclosed to Dade County Mayor Stephen Clark, as alleged in Article XVI.

1. Information Provided to Judge Hastings

AUSA Martinez presented Judge Hastings with materials explaining the details and background of the investigation and its targets, and the need for a court-ordered wiretap. Judge Hastings signed the necessary orders approving the wiretap and, as required by statute, he placed the documents under seal, thereby rendering the information confidential. In the months that followed, weekly progress reports and a request for an extension of the authorization were also presented to the court; each time, Judge Hastings reviewed and signed the report and placed it under seal.

These reports described the information that had been obtained through the wiretap and related investigation, and included the facts that ultimately were disclosed to Mayor Stephen Clark. Although the mayor was not a subject of the investigation, the reports frequently alluded to him. On several occasions, these references were also specifically discussed by Judge Hastings and the federal investigators who presented the reports to him.

For example, the August 15, 1985 submission reports that one of the targets of the wiretap, Kevin "Waxy" Gordon had told Rivero that he had Mayor Clark in his pocket, that he had raised $40,000 in contributions for the mayor, and that Gordon was going to approach the mayor for assistance regarding the off-loading of narcotics. When presented with this report, Judge Hastings remarked to the FBI case agent, Geoffrey Santini, that "if [Waxy] doesn't keep his mouth shut, he is going to get everyone into trouble including the mayor."

Two weeks later, the progress report of August 29 related a discussion in which Mayor Clark told Rivero, "If you have any problems with that thing in Hialeah get in touch with me." When asked by Gordon for the name of his contact, Mayor Clark gave the name of a Hialeah councilman and added, "If you have any problems with him, get back in touch with me."

After reading this report on the bench, Judge Hastings and Martinez went to the judge's chambers. Once there, Judge Hastings observed, "Pretty heavy stuff." Martinez replied, "Do you mean Mayor Clark?" and the judge answered affirmatively. Martinez told the judge that Mayor Clark was not a target of the investigation. He then went on to explain the nature of the Hialeah zoning investigation, and the mayor's peripheral involvement. Judge Hastings responded, "Clark better be careful because he could get in trouble hanging around Waxy."

Before the Impeachment Trial Committee, Judge Hastings conceded that the accounts by Martinez and Santini as to their conversations with him about the wiretap reports were essentially accurate, that he had reviewed the reports, and that his sole source of information about the Hialeah investigation as it involved Mayor Clark was from those discussions and reports.

2. The Disclosure of Confidential Information.

On September 6, 1985, Mayor Clark attended a breakfast meeting at the Miami Hyatt Regency Hotel at which Judge Hastings was the guest speaker. At that conference Judge Hastings took Mayor Clark aside, and said to him in a low tone, "Stay away from Kevin Gordon, he's hot, he's been using your name in the Hialeah area."

Both Judge Hastings and another participant at the conference, Monsignor Bryan Walsh, testified that Judge Hastings spoke with Mayor Clark at the conference, prior to Judge Hastings' speech. Mayor Clark recalls the surreptitious conversation with the judge occurring later, after Judge Hastings had delivered his speech. In any event, Mayor Clark unequivocally testified that on that morning, after he greeted the judge, Judge Hastings disclosed the confidential information.

After this encounter, Mayor Clark called a colleague, and told him to ask Gordon to meet the mayor at 11:30 that morning. Because Gordon was a target of the wiretap, that call was intercepted. The time of the interception was 8:58 a.m.

At that meeting, Mayor Clark confronted Gordon with the information he had learned from Judge Hastings. In the face of Gordon's denials, the mayor then informed Gordon that he had it from a "very authoritative source that you're using my name in the Hialeah area." Gordon pressed the mayor for the source of his information. Ultimately, Mayor Clark told him that the information came from a Federal judge, and he named Judge Hastings. Gordon was visibly shaken by this information.

Three days later, on a wiretapped telephone, Gordon told a friend about his discussion with the mayor. Gordon relayed that Alcee Hastings, a federal judge, had told Mayor Clark of a rumor that Gordon was involved with Clark and some councilman in Hialeah on some deal. Gordon observed that for a Federal judge to know of the matter, it had to be "pretty high in the Justice Department or someplace." The FBI intercepted the call and Santini immediately contacted Rivero and instructed him to be careful because there could be a problem and to try to contact Gordon to find out what was going on. Santini did not, however, inform Rivero of the nature of the problems. Precautions were then taken to protect Rivero.

On September 10, Rivero met with Gordon, who was very upset and patted Rivero down. He then told Rivero that Judge Hastings had told Mayor Clark that Gordon's home and office phones were wired -- a conclusion which he later admitted to having reached on his own. Gordon had immediately recognized the significance of the information Mayor Clark had passed along and was suspicious of the informant and an FBI undercover agent. Since Gordon was intimately involved in both the zoning and union probes, these investigations had been fatally compromised. Moreover, given the violent nature of some of the suspects, who included organized crime figures, these investigations had become too risky for Rivero. Accordingly, these operations were terminated immediately. The investigation of corrupt North Bay Village police officers engaging in drug smuggling was considered to be sufficiently isolated from Gordon to continue.

3. The Investigation of the Leak

To investigate the leak, the Government decided to seek Gordon's cooperation. The investigators pursued Gordon's previously stated offers to Rivero to obtain narcotics and arranged two controlled drug purchases. On November 18, 1985, Gordon was confronted with the narcotics transactions and he agreed to cooperate.

In his interviews, Gordon confirmed the content of his September 6 conversation with Mayor Clark. He consented to wear a body recorder and, on January 17, 1986, Gordon recorded a conversation with Mayor Clark about the leak. In that discussion, Mayor Clark essentially repeated to Gordon what he had told him on September 6: while at a function at the Hyatt, Judge Hastings had warned Clark not to get near Gordon because Gordon was involved in some zoning in Hialeah, and he had problems.

In February, 1986 Gordon died of a heart attack. Shortly thereafter, the FBI made their arrests in the North Bay Village case. The following day, the leak investigation went overt and the FBI interviewed Mayor Clark. The mayor reiterated that it was Judge Hastings who had warned him to stay away from Gordon.

Mayor Clark testified before a grand jury, and his statements there were consistent with his earlier recollections of the discussion with Judge Hastings. Thereafter, the FBI interviewed three people listed on the program of the September 6 conference and confirmed that Mayor Clark was present at the conference at which Judge Hastings had given a speech.

On May 19, 1986, FBI Special Agent Christopher Mazzella attempted to speak to Judge Hastings about the disclosure. However, Judge Hastings refused to discuss the matter, claiming that it would be unlawful for him to discuss the wiretap with Mazzella, despite the fact that Mazzella identified himself as the case agent on the wiretap. Judge Hastings suggested that he would speak with an attorney from the Department of Justice, but declined to do so when he was called by a representative of the Public Integrity Section the following day.

4. Corroboration of Mayor Clark's Identification of Judge Hastings as His Source.

Mayor Clark has repeatedly and unequivocally stated that Judge Hastings was his source. He has had no apparent motive to fabricate this allegation, and the timing and circumstances of the leak, as well as the history of the underlying investigation all suggest there is no plausible alternative source of the information. The sole basis for Judge Hastings' attack on the mayor's credibility is that Mayor Clark recalls the discussion with Judge Hastings as having occurred after the judge delivered his speech, not before.

The House does not dispute that there is evidence in the record challenging Mayor Clark's recollection of the timing of the disclosure. The fact that the mayor is mistaken with respect to this aspect of his recollection, however, does not mean that he fabricated his entire account of the disclosure.

As Special Agent Mazzella testified, witnesses get the sequence of events mixed up all the time. Such confusion about timing is even more likely under circumstances where, as here, the witness was not called upon to remember the precise details of the event until he was interviewed by the FBI over five months later. Moreover, the essential elements of Mayor Clark's account are all corroborated.

Clearly, Judge Hastings and the mayor had the opportunity to discuss the matter on the morning of the September 6 conference. Also, Judge Hastings was one of a very limited number of persons who had been provided with the information that Mayor Clark later repeated to Kevin "Waxy" Gordon. More significantly, Judge Hastings concedes that in his discussions with AUSA Martinez and Special Agent Santini, he raised the precise facts that were relayed to Mayor Clark -- that Gordon was "hot," i.e. under investigation; that Gordon was using the mayor's name; and that this was occurring in Hialeah. The fact that it was precisely these matters, and no others, that Judge Hastings focused on in his discussions with federal investigators is no mere coincidence.

Further support for Mayor Clark's version of the events is that immediately after the September 6 meeting at the Hyatt Regency, the undercover operations fell apart. Gordon immediately began to suspect that undercover agents were in their midst, as indeed they were. Prior to September 6, 1985, there had been no indication that confidential information from the wiretap or the investigation had been disclosed. In fact, the indications were to the contrary: the wiretap had been extremely productive and additional crimes in many areas were being discovered.

Perhaps the most persuasive corroborating factor, however, is that given these undisputed facts, no other explanation makes sense. To believe that Judge Hastings is not the source of the leak, one must not only believe that Mayor Clark was lying, but also that either a bizarre and complicated series of coincidences or a deliberate plot occurred. That is, it is not sufficient to merely speculate as to who besides Judge Hastings had access to the wiretap reports. A plausible alternative explanation must also take into account the timing and consequences of the leak, and its particular content.

Judge Hastings suggests that Mayor Clark obtained the warning from someone else. His most favored theory is that because Mayor Clark played golf on a regular basis with two FBI agents, someone in the bureau was his source. An additional fact was presented in support of this proposition: on July 23, 1985, about a week after the wiretap was approved, the fourth member of the golfing group called the FBI and asked if the mayor was under investigation.

While these coincidences invite speculation, the leak had to have occurred after August 22, when Clark told Rivero he would help him on the Hialeah matter, for one can hardly assume that the mayor would intentionally implicate himself just to bide his time to blame Judge Hastings for the leak. By the end of August, however, the mayor was not playing golf with his FBI friends. Moreover, none of the agents who had golfed with Mayor Clark were even working on the underlying investigation. Finally, it is highly unlikely that FBI agents and former agents would compromise ongoing investigations and place undercover operatives, and their fellow agents, in mortal danger.

The House submits that pursuing such inquiries would have been nothing more than boxing at shadows and might very well have endangered the only plausible lead the investigators had. In any event, the issue for the Senate is not whether more could have been done, but whether the evidence against Judge Hastings is sufficient. The House submits that the evidence establishes Judge Hastings' guilt.

5. The Intentional Unauthorized Disclosure of Confidential Information by a Federal Judge is an Impeachable Offense

The few words uttered by Judge Hastings to Mayor Clark in a chance meeting at a downtown Miami hotel were to have an expensive and lasting impact on Federal law enforcement. Some of those costs were calculable -- extensive manpower and other resources had been committed to the union investigation for over a year, and nearly as long in the Hialeah case. The cost of the wiretap alone was in excess of $300,000. Equally costly, however, was the chilling effect on the FBI's ability to develop informants and cooperating witnesses. This was true not only in the abstract, but also with respect to specific persons who previously had provided invaluable help.

The disclosure also created a perhaps irremediable breach of trust within the criminal justice system. Martinez described the sense of betrayal he now feels in his dealing with Judge Hastings, expressing his belief that respondent's continued presence on the bench is dangerous. Special Agent Santini echoed this concern when he testified that because his oath of office and conscience preclude him from placing undercover agents and informants in dangerous situations, he would no longer present applications for wiretaps to Judge Hastings.

In this case, the breach of trust was not only a violation of Judge Hastings' oath of office, but it was in reckless and callous disregard of the lives of innocent people. The fact that any leak in these investigations could be life-threatening to the undercover informant and agents and could alert the subjects to the probe was implicit, if not explicit, in the materials submitted to Judge Hastings. That the judge would ignore these warnings, and casually pass along secret information, compounds his misconduct.

ARTICLE XVII

The final Article of Impeachment is the so-called "omnibus" article. The totality of Judge Hastings' conduct -- his corrupt relationship with William Borders, his repeated false testimony at his criminal trial, his fabrication of evidence at his criminal trial, and his disclosure of confidential wiretap information -- demands that he be removed from the Federal bench. Article XVII rests on the same evidence adduced in support of Articles I through XVI. Conviction on Article XVII, however, rests on a separate legal theory, which has roots deeply imbedded in the Senate's impeachment power.

In every impeachment trial in the 20th century that resulted in conviction, the Senate has voted for an article that included several acts of misconduct, including acts that were separately alleged in other articles. The Senate has therefore recognized that an omnibus article is a separate and important basis for removing a corrupt official from public office in an impeachment proceeding.

ADEQUACY OF THE RECORD

As part of his defense to the charges related to the Romano bribery scheme, Judge Hastings complains that the record is incomplete, naming witnesses who have either died or are no longer competent to testify, and citing records which are no longer available. There is no merit to this defense.

First Judge Hastings' argument ignores the fact that this issue has already been resolved by the Senate. In a nearly unanimous vote, the Senate rejected Judge Hastings' motion to dismiss Articles I through XV of the Articles of Impeachment on the grounds that the delay between the time of the offenses and time of the impeachment proceedings was prejudicial.

Nor is the Senate barred from considering this matter because the record so incomplete that it is impossible for the Senate to reach a fair and true verdict. To the extent that there is harm resulting from unavailable records or dimmed recollections, both parties are hampered in their presentation of the case. More importantly, in spite of Respondent's freewheeling speculations about the facts which might be proved by the "missing evidence," even the "missing evidence" could not explain away the damning evidence of Judge Hastings' complicity. For example, what unavailable record or missing witness could explain Judge Hastings' appearance at the Fontainebleau Hotel, the coded conversation with William Borders or Judge Hastings' irrational flight from Washington after Borders' arrest? Conjecture as to what witnesses might have testified to or records might have shown cannot satisfactorily explain the overwhelming incriminating evidence that Judge Hastings is guilty as charged of conspiring with William Borders to sell his office.

STANDARD OF PROOF AND IMPACT OF THE JURY VERDICT

Senate precedent as well as the nature and purpose of impeachment dictate that a civil rather than criminal standard of proof applies in this and any impeachment case. Judge Hastings' reliance on the criminal standard of "beyond a reasonable doubt" has absolutely no historical support. Moreover, it is inconsistent with the very function of impeachment in our constitutional Government.

In this very case, the Senate determined that impeachment is not a criminal proceeding. By rejecting Judge Hastings' motion that the doctrine of double jeopardy barred this case from going forward, the Senate recognized that impeachment is remedial rather than criminal in nature. It is an independent proceeding serving a fundamentally different purpose than criminal prosecution.

The House submits that the appropriate standard of proof, therefore, is the prevailing civil standard, "preponderance of the evidence." That is, if the evidence establishes that it is more likely than not that Judge Hastings engaged in the misconduct as charged, a guilty vote should follow. If, however, a Senator wants to employ a higher standard, at most that of "clear and convincing" evidence should be the choice. This too is a civil standard, consistent with the nature and purpose of impeachment. And as with any civil standard, proof to an absolute or moral certainty is not required.

Adopting a civil standard of proof is consistent with the nature and purpose of impeachment. In an impeachment proceeding, the Constitution reserves to the Senate the task of determining whether an impeached government official should retain public office. At issue is the public's trust and confidence in the officials who constitute our government, in this case the Federal judiciary. The rights of the public at issue here militate against a standard of proof focusing solely on the respondent. A civil standard takes into account the Senate's weighty responsibility and its obligation to the public to protect the integrity of our institutions of government.

Finally, it must be emphasized that Judge Hastings' acquittal in his criminal case in no way alters the conclusion that a civil standard of proof should be used in this proceeding. To acknowledge the jury verdict by raising the standard to proof beyond a reasonable doubt undermines the Senate's determination that impeachment is an independent remedial proceeding. Moreover, a decision as to what standard applies in an impeachment case should depend upon the nature of impeachment, not upon any prior judicial proceeding.

It is the position of the House of Representatives that Judge Hastings' acquittal is, in fact, of no consequence in this case. In an impeachment, both the House and Senate have a unique constitutional responsibility. To defer to a jury verdict in effect places in the hands of the Judicial Branch what is clearly a legislative function. Moreover, in this case, to defer to the acquittal would be tantamount to accepting a jury verdict obtained by fraud.

At most, Judge Hastings' acquittal should be one of several factors weighed by the Senate when exercising its constitutional responsibility. The House submits that even if a Senator puts the verdict into the equation, the evidence is nonetheless overwhelming that Judge Hastings participated with William Borders in a conspiracy to obtain a bribe. Judge Hastings is guilty as charged.

VI. CONCLUSION

For the foregoing reasons, the House of Representatives submits that the Senate should convict Judge Hastings on all 17 Articles of Impeachment.

Respectfully submitted,

The United States
House of Representatives

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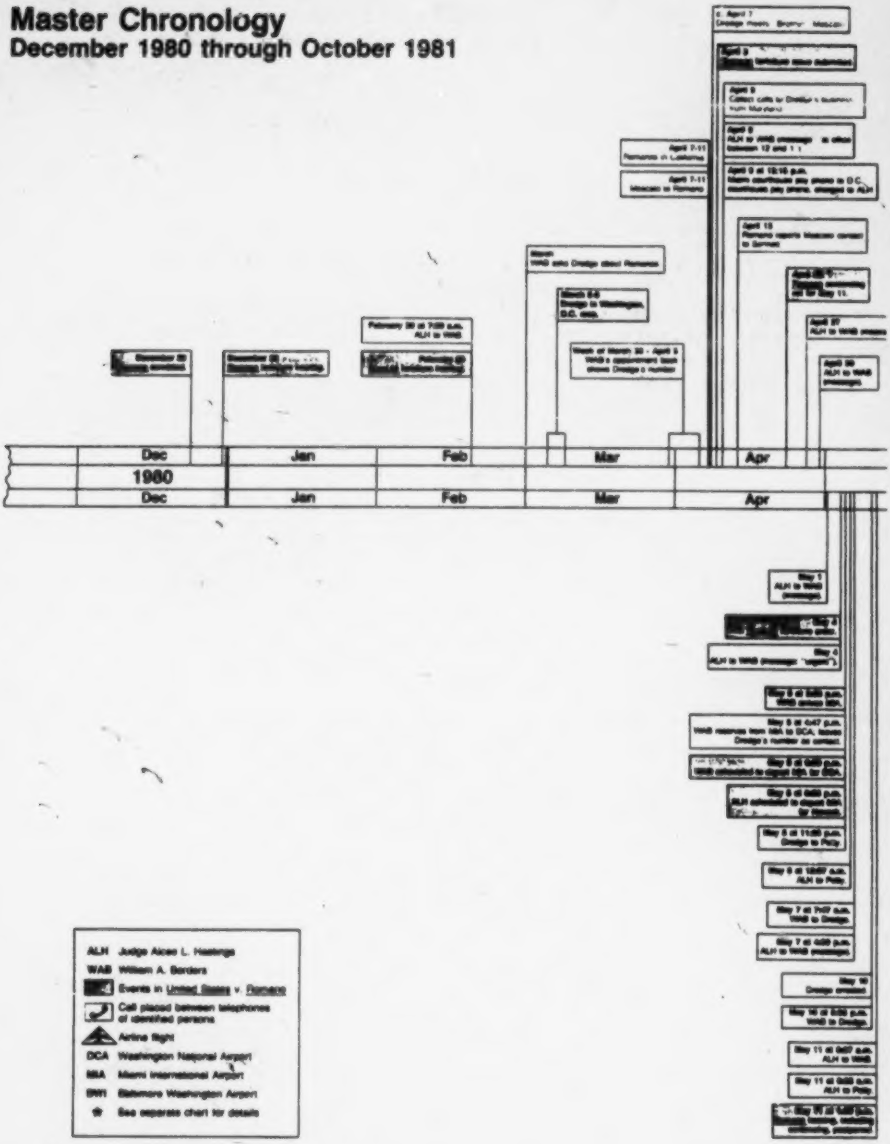
October 4, 1989

ATTACHMENT A

Master Chronology
December 1980 through October 1981


Dec
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1980
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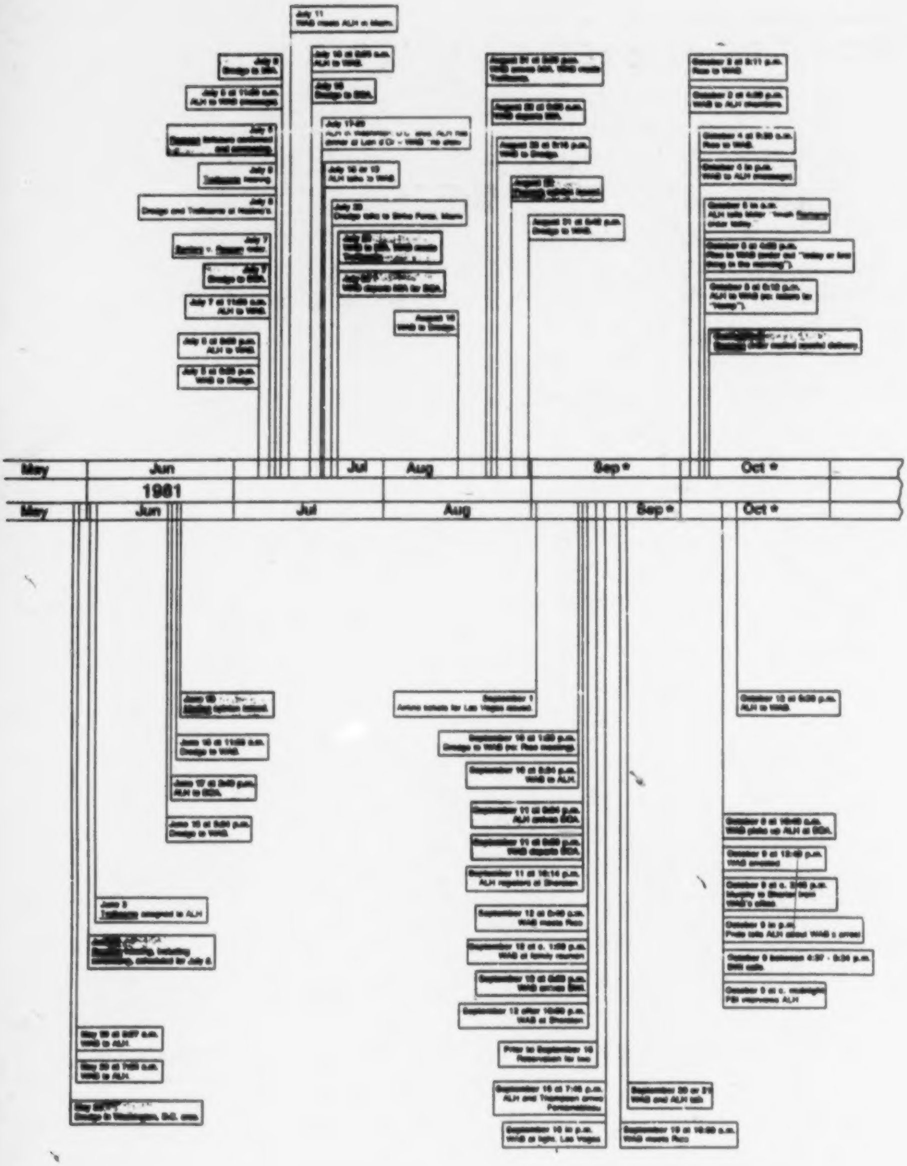
ALH Judge Alcee L. Hastings
WAB William A. Borders
Events in United States v. Romano
Call placed between telephones of identified persons
Airline flight
DCA Washington National Airport
MIA Miami International Airport
BWI Baltimore Washington Airport
See separate chart for details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ATTACHMENT B

Activities of September 1981

Date	☎	Event	✈
Tuesday, September 1		• Airline tickets for Las Vegas issued	
11:36 am	• WAB to ALH		
Wednesday, September 9			
9:53 am	• Dredge to WAB		
Thursday, September 10			
8:00 am	• WAB to Dredge		
9:35 am	• ALH to WAB (msg.)		
1:29 pm	• Dredge to WAB (re: Rico meeting)		
4:40 pm	• WAB to ALH		
5:10 pm	• ALH to WAB (msg.)		
5:34 pm	• WAB to ALH		
Friday, September 11			
3:37 pm	• ALH to WAB		
4:20 pm	• ALH to WAB (msg.)		
7:30 pm		• WAB does not take flight to Miami	
8:04 pm			• ALH arrives DCA
9:20 pm			• WAB departs DCA
10:14 pm		• ALH registers at Sheraton	
Saturday, September 12			
1:30 am			• WAB arrives MIA
8:40 am		• WAB meets Rico	
11:00 am			• WAB departs MIA for West Palm Beach
c. 1:00 p.m.		• WAB at family reunion	
1:06 pm		• WAB reserves EAL 532 to depart West Palm Beach at 4:13 pm	
3:30 pm		• WAB cancels EAL 532, reserves EAL 266 to depart Melborne at 4:35 pm	
4:39 pm		• At Melborne, WAB cancels EAL 266, reserves EAL 858 to depart Orlando, 8:08 pm	
6:02 pm		• At Orlando, WAB cancels EAL 858, reserves 664 to depart Orlando at 6:45 pm	
7:00 pm			• WAB departs Orlando
8:58 pm			• WAB arrives BWI
after 10:00 pm		• WAB at Sheraton	
Prior to September 16		• Reservation for two	
Wednesday, September 16			
7:45 pm		• ALH and Thompson arrive Fontainebleau	
pm		• WAB at fight, Las Vegas	
Friday, September 18			
8:00 pm			• WAB and Petty arrive DCA
9:20 pm			• WAB departs DCA
Saturday, September 19			
10:00 am		• WAB meets Rico	
September 20 or 21	• WAB and ALH talk		

☎ Call Placed between telephones of identified persons. ✈ Airline flight.

ATTACHMENT C

Activities of October 1981

Date	☎	Event	✈
Friday, October 2			
3:11 pm	• Rico to WAB		
4:50 pm	• WAB to ALH chambers		
Sunday, October 4			
9:38 am	• Rico to WAB		
pm	• WAB to ALH (message)		
Monday, October 5			
am		• ALH tells Miller "finish Romano order today"	
4:22 pm	• Rico to WAB (order out "today or first thing in the morning")		
5:12 pm	• ALH to WAB (re: letters for "Hemp")		
Tuesday, October 6		• Romano order mailed special delivery	
Wednesday, October 7			
12:19 pm	• Rico to WAB ("it went out yesterday")		
7:39 pm	• WAB to Rico		
Thursday, October 8			
9:37 am	• ALH to WAB		
Friday, October 9			
10:40 am			• WAB picks up ALH at DCA
am		• ALH with WAB	
11:46 am	• WAB to Rico		
12:40 pm		• WAB arrested	
c. 2:45 pm	• Murphy to Shorter from WAB's office		
c. 2:45 pm	• Shorter to Pride		
pm		• Pride tells ALH about WAB's arrest	
2:50 pm		• FBI arrives to interview ALH staff	
2:50 to 3:00 pm		• FBI arrives to interview P. Williams	
4:37 pm	• At BWI: ALH to mother		
4:43 pm	• At BWI: ALH to mother		
5:06 pm	• At BWI: ALH to P. Williams		
5:07 pm	• At BWI: P. Williams to ALH		
5:22 pm	• At BWI: P. Williams to ALH from pay phone		
5:24 pm	• At BWI: ALH to P. Williams at pay phone		
6:30 pm			• ALH scheduled to depart BWI
8:38 pm			• ALH scheduled to arrive Ft. Lauderdale
c. Midnight		• FBI interviews ALH	
Monday, October 12			
6:20 pm	• ALH to WAB		

☎ Call Placed between telephones of identified persons. ✈ Airline flight.

In the Senate of the United States
Sitting as a Court of Impeachment

IN RE IMPEACHMENT OF JUDGE ALCEE L. HASTINGS

POST TRIAL MEMORANDUM OF THE HOUSE OF REPRESENTATIVES

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SEPTEMBER 25, 1989

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INTRODUCTION

By a vote of 413 to 3, the House of Representatives, in its impeachment proceeding, charged United States District Judge Alcee L. Hastings with 17 acts of misconduct that strike at the heart of our democracy. Selling his office for personal gain, fabricating documents to establish his innocence, lying repeatedly under oath at his criminal trial, ignoring the dictates of his own court order to tip off an acquaintance about wiretap information -- these are the separate actions over a period of more than five years which compel the conclusion that Judge Hastings should be removed from office.

In the brief that follows, the House of Representatives summarizes the evidence that was adduced before the Senate Impeachment Trial Committee on each Article of Impeachment and, based upon those facts, presents the argument in support of its case. The facts are complex and detailed; it is only by carefully sifting through this information -- much of it undisputed -- that the true meaning can be appreciated. Unfortunately, that truth presents a tale of enormous tragedy, both for the nation and Judge Hastings.

For all the reasons set forth below, the House of Representatives submits that the Senate should convict Judge Hastings on all 17 Articles of Impeachment now pending before it.

PART ONE

ARTICLES I - XV

BRIBERY CONSPIRACY AND FALSE STATEMENTS AT TRIAL

Part One of this brief addresses the first 15 Articles of Impeachment, which charge Judge Hastings with conspiring with William Borders to obtain a bribe from persons who were criminal defendants in his courtroom, and with knowingly testifying falsely at his criminal trial when charged with that crime. The Statement of Facts below addresses all 15 articles. The argument in support of each article follows.

A. STATEMENT OF FACTS

1. Background

In October, 1979, Alcee L. Hastings was sworn in as a United States District Judge for the Southern District of Florida. Participating in his investiture ceremony was his good friend William Borders, then a Washington, D.C. attorney. Judge Hastings and William Borders were political allies and social friends. Indeed, according to Judge Hastings, William Borders played a role in his appointment to the Federal bench.[1]

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[1] Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, S. Hrg. 101-194, Pts. 2A and 2B (hereinafter only the page number is cited) at 2217-18, 2337-38, 2433-34; Stipulation (hereinafter "S.") S.2, S.4, S.5. (A list of the stipulations can be found in S. Hrg. 101-194, Pt. 1 at 865.)

Also attending Judge Hastings' investiture ceremony was Hemphill Pride, a friend of both Judge Hastings and William Borders. Pride was particularly close to Judge Hastings. They had known each other since 1959, had been roommates in law school and had remained very close friends. Each man was godfather to the other's first son. After graduating from law school, Pride had returned to South Carolina to practice law.[2]

In 1977, Hemphill Pride was convicted in Columbia, South Carolina of misusing funds in a federally subsidized housing project. He served one year in prison, beginning in March, 1980. While in prison, Pride asked Judge Hastings to raise money on his behalf in order to hire counsel to pursue certain post-conviction relief. Judge Hastings refused on the grounds that his position as a Federal judge precluded such action.[3]

Pride was paroled in March, 1981, and he immediately began work at two jobs in Columbia, South Carolina. He could not be employed as a lawyer, however, because he was indefinitely suspended from the practice of law by the Supreme Court of South Carolina. As a result of his criminal conviction, numerous proceedings had been held on Pride's ability to practice law, which resulted in his indefinite suspension on May 26, 1981. Neither Judge Hastings nor William Borders directly assisted Pride in the South Carolina proceedings. They were not character witnesses during the hearings. Nor did they write letters on Pride's behalf.[4]

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[2] 676-77, 1731, 2217, 2435-36.

[3] 677-78, 683-85, 2258, 2388-89; House Exhibit (hereinafter "HX.") 126.

Under the governing state rules, Pride could not apply for readmission to the South Carolina bar for two years, until May, 1983. He also had to take and pass the South Carolina bar examination. Thus, in 1981, Pride was ineligible for reinstatement to the South Carolina bar.[5]

2. The Romano Case

In November, 1978, Thomas and Frank Romano were indicted on 21 counts of racketeering, mail and wire fraud, embezzlement and false tax filings. The indictment alleged violations of the Racketeer Influenced Corrupt Organization statute ["RICO"] which, under certain circumstances, could result in the forfeiture of property connected with the illegal racketeering activity. The case was assigned to Judge Hastings within the first week he was on the Federal bench.[6]

In December, 1980, the Romano brothers were tried before a jury. The prosecution, handled by James Deichert of the Organized Crime Strike Force of the U.S. Department of Justice, presented evidence that the Romanos had looted a construction project of over a million dollars through various fraudulent means. During the trial, the prosecution also made a proffer to Judge Hastings, out of the presence of the jury, that the Romanos had a history of making payoffs. In addition, Judge Hastings heard evidence indicating that the Romanos had access to large sums of cash.[7]

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[4] 677-78, 685-86, 715-16.

[5] 678-79, 732-33; HX. 125.

[6] S.6, S.7.

On December 23, 1981, the jury found the Romano brothers guilty on all counts. Thereafter, the parties agreed to try the resulting forfeiture issues before the court without a jury. Judge Hastings heard part of the prosecution's proof on the forfeiture issues on December 30, 1980. He then continued the matter until February 20, 1981. Thereafter, the Romanos retained a new attorney, Neal Sonnett, to handle their sentencing and appeal.[8]

On February 20, 1981, Judge Hastings concluded the evidentiary hearing on the forfeiture matter. The judge reserved ruling and asked the parties to submit memoranda. Judge Hastings stated that sentencing would not be scheduled because there were to be additional submissions by the parties and the court had not yet received the presentence reports.[9]

On March 13, 1981, the Government filed its proposed findings of fact and conclusions of law on the forfeiture issue. On April 6, 1981, the Romanos filed their memorandum of fact and law in opposition to forfeiture. On April 7, 1981, the Romanos filed objections to the Government's proposed findings of fact. The next day, April 8, 1981, the Government filed a lengthy memorandum which sought forfeiture of property totalling $1,162,016 in value.[10]

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[7] 24, 26-28, 2344; S.8.

[8] 26; HX. 2; S.11-13.

[9] S.14.

Throughout 1981, the law clerk in Judge Hastings' chambers assigned to the Romano case was Jeffrey Miller. On April 23, 1981, Miller advised the parties that sentencing of the Romanos would take place on May 11, 1981. The official Notice of Sentencing was filed on April 28, 1981, setting the hearing for May 11 at 1:00 p.m.[11]

Prior to sentencing, on May 4, 1981, Judge Hastings entered a forfeiture order in the Romano case. He adopted all of the proposed findings of fact submitted by the prosecution, ordering the forfeiture of property owned by the Romanos worth $1,162,016.[12]

3. William Dredge and Further Events in Romano

In 1981, William Dredge operated an antique store in North Miami, Florida. He was a career criminal, with a lengthy history of arrests. Through Joseph Nesline, a Washington D.C. gambler, William Dredge met William Borders.[13]

In March, 1981, Borders asked Dredge if he knew the Romano brothers, since Dredge was from the south Florida area. When Dredge responded that he did not know them, Borders asked him to determine whether the Romanos were "stand up" people. Dredge made some inquiries and reported to Borders that the Romanos were trustworthy in the underworld, they were part of the Genovese crime family from Chicago and they had a pending court case. William Borders then asked Dredge to contact the Romanos and tell them that there was an attorney in Washington, D.C. who could help them with their case.[14]

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[10] HX. 2; S.271.

[11] 611-12; HXs. 2, 13; S.15.

[12] 29, 2340; S.17.

[13] 76-77, 165, 244-45.

William Dredge passed Borders' message to Philip "Brother" Moscato, a business associate of the Romanos. Hotel and telephone records establish that the Romanos were in California from April 7 to April 11, 1981. During their stay they learned through Moscato that a Washington attorney could help them with their court case. The Romanos then contacted their counsel, Neal Sonnett, and reported the offer. Sonnett documented the call in a memorandum dated April 16, 1981. The Romanos decided to ignore the offer.[15]

Dredge reported to Borders about his attempted contact with the Romanos. Borders stated that the judge handling the Romanos' case was a good friend of his and he could do things with the judge. Dredge testified he did not really believe Borders could control a Federal judge.[16]

During the spring and early summer of 1981, Borders repeatedly asked Dredge about the Romanos. To put Borders off, Dredge falsely reported that he had talked to them and that they were not interested. Dredge also told Borders that the Romanos had already paid $50,000 for help from the judge. In response, Borders stated that that was impossible because only he could do business with Judge Hastings. William Borders remarked to Dredge that he would hate to be in the shoes of the person who had promised Judge Hastings' help when the Romanos found the imposter out.[17]

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[14] 77-79.

[15] 80, 174-75, 197-98; HXs. 25-26.

[16] 81, 84-85.

In their conversations about the Romanos, William Dredge admits that he was only stringing Borders along. Dredge had told Philip "Brother" Moscato that if the Romanos were interested in a deal they should get back to him. They never did. After passing the initial message in early April, Dredge never had any contact with the Romanos or Moscato. Dredge testified that he was stringing Borders along because Dredge knew he had his own problems.[18]

On April 29, 1981, a sealed indictment was returned in the United States District Court for the District of Maryland charging William Dredge with conspiring to sell drugs. Dredge was arrested in Florida on Sunday, May 10, 1981 and, through Borders, he hired Jesse McCrary to represent him at his bond hearing the next day, Monday, May 11, 1981. Jesse McCrary was a Miami attorney and close friend of Judge Hastings.[19]

In the morning of May 10, 1981, prior to his arrest, Dredge had had a telephone conversation with William Borders. In that conversation, Borders told him that the Romano brothers were to be sentenced by Judge Hastings the next day, that the sentencing would be continued by the judge on the court's own motion and, if the Romanos did not come up with the money, the next time the hammer would fall.[20]

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[17] 83-84.

[18] 93-95.

[19] 84, 86-87, 157-58, 1448-49, 1457-58; HX. 14.

William Borders was right, for the next day, May 11, 1981, Thomas and Frank Romano were scheduled to be sentenced. The parties were also to argue the defendants' motion for new trial and motion for a judgment of acquittal. These motions, if granted, would render sentencing moot.[21]

On May 11, 1981, Judge Hastings held the Romano hearing and proceeded in a most unusual manner. Instead of addressing the pending motions first, which would have been the logical order, Judge Hastings immediately proceeded to sentencing. Neal Sonnett, the Romanos' attorney, then requested a continuance in order to present additional argument to the court on the pending motion for new trial. The Government opposed the continuance on the grounds that five months had passed since the guilty verdict and that the legal issues Sonnett wanted to argue had previously been briefed or raised. Nonetheless, Judge Hastings granted the continuance.[22]

In May, 1981, the local rules of the Southern District of Florida required that counsel give notice to the Court and to opposing counsel prior to moving for a continuance. Neal Sonnett does not recall whether he called chambers to give Judge Hastings such notice, although it would have been his practice to do so if time had permitted. In 1981, it was also the practice of Jeffrey Miller to tell Judge Hastings if an attorney had called indicating he would be moving for a continuance. Moreover, at Judge Hastings' criminal trial, Miller testified that Sonnett did advise the court of his intention to move for a continuance, although before the Impeachment Trial Committee he changed his testimony.[23]

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[20] 84-85, 169, 250.

[21] 29, 670-71, 2345-46; HX. 4.

[22] 29-31, 670-71, 2345-46; HX. 4; S.19.

The day after the Romano sentencing was postponed, William Borders called Dredge and told him of the continuance. Dredge thereupon became convinced that William Borders was connected to Judge Hastings and was serious about a bribery deal. It was Dredge's understanding, based on what Borders had told him, that Judge Hastings had postponed the sentencing on his own motion. Defense counsel had actually requested the continuance. However, the fact that Borders knew in advance that sentencing would be continued convinced Dredge that the Romano bribery scheme was for real.[24]

On June 1, 1981, the Romano hearing was rescheduled for July 8, 1981. On June 19, 1981, a panel of the Fifth Circuit handed down a decision in United States v. Martin[illegible] issue in the case was an interpretation of the RICO statute's forfeiture provisions pertaining to the definition of an interest that was subject to forfeiture. The court held that the term "interest" did not include income, receipts or profits from racketeering activity.

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[23] 30, 213, 222-23, 613-16.

[24] 29-31, 84-86, 117; HX. 4.

The prosecution and defense counsel in Romano recognized that the opinion had important implications for the order previously entered by Judge Hastings on May 4, 1981, forfeiting property owned by the Romanos worth $1,162,016. Accordingly, all parties briefed the issue in papers filed with the Court in advance of the July 8, 1981 hearing.[25]

At the July 8 hearing, Judge Hastings was scheduled to sentence the Romano brothers and hear argument on all the outstanding motions, including a motion to reconsider his May 4 forfeiture order. Prior to the hearing, Jeffrey Miller gave Judge Hastings a memorandum discussing the Martino case and its impact on Romano. Miller also briefly discussed the issues with the judge prior to the hearing. After extensive argument on the forfeiture issue, Judge Hastings stated to counsel that he was familiar with Martino and had read the briefs. He then reaffirmed his order of May 4, 1981, forfeiting $1,162,016 of the Romanos' property. He stated that he would file a brief written order explaining the basis for his decision.[26]

Judge Hastings then sentenced each of the Romanos to three years in prison and advised them of their rights of appeal. The prison terms were consistent with the recommendation of the probation office. However, the prosecutor, James Deichert, was surprised by the stiff sentences because Thomas and Frank Romano were both over 60 years of age, they had no other criminal convictions, and one of the brothers had a serious heart problem. The three year sentences could have been life sentences, given the age and medial condition of each of the Romano brothers. Defense counsel had requested probation.[27]

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[25] 31, 33-34, 36-37, 626-27, 2346-47; HXs. 2, 5.

[26] 32, 37, 627-30, 636, 2279-80; HXs. 6, 119; S.24.

4. The Undercover Investigation

On June 3, 1981, the case of United States v. Accardo was brought in the Southern District of Florida. This was a multi-defendant racketeering case in which Santo Trafficante, reputed to be the organized crime boss of southern Florida, was named as a defendant. The case was assigned to Judge Hastings. A month later, William Dredge flew to Washington, D.C. and stayed with Joseph Nesline from July 7-9, 1981. At that time, Nesline had another guest at the apartment -- Santo Trafficante. While at the apartment, Dredge observed Trafficante trying to contact William Borders. Bits and pieces of conversation he heard during that visit and during a second visit from July 16-18, 1981, led Dredge to believe that William Borders and Judge Hastings were involved in a bribery scheme to obtain money from Santo Trafficante. There was no doubt that any person who attempted to defraud Trafficante would be in a very dangerous situation.[28]

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[27] 32-33, 57; S.25-26.

[28] 87-91, 236-37, 382; HXs. 17-19, 111-14, 216; Prior Testimony (hereinafter "PT") of Laverne Boone at 481-83. (Prior testimony citations are to the reprint of that testimony in S. Hrg. 101-194, Pts. 2A and 2B.)

On July 20, 1981, Dredge advised the United States Attorney's Office in Miami that he had information concerning a bribery scheme involving Judge Hastings, Santo Trafficante and a prominent Washington, D.C. lawyer who was coming to Miami the next day to meet with Trafficante. In return for this information, Dredge wanted the drug charges pending against him in Maryland dismissed. In the course of ensuing discussions with Government prosecutors, Dredge also revealed the proposal to solicit a bribe from the Romanos -- the essence of which was that for $150,000 their sentences would be reduced to probation.[29]

Dredge did not initially identify William Borders as the Washington lawyer who was arriving the next day to meet with Trafficante. However, Martha Rogers, a Miami Strike Force attorney who had worked in Washington, recognized Borders' name on a passenger list and visually identified him at the airport. The FBI followed Borders, who took a cab to William Dredge's house and was later driven by Dredge to a shopping center. From there Borders took a cab to the Fontainebleau Hotel, where the FBI observed him meeting with Santo Trafficante for 15 to 20 minutes. Trafficante then drove Borders back to the airport. As they parted, Trafficante was overheard telling Borders, "good job."[30]

William Dredge continued to be debriefed by the Government concerning his knowledge of the bribery schemes. He met with William Murphy, a veteran FBI agent who became the case agent.

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[29] 92-93, 238-41, 244.

[30] 24, 238-39, 241-42, 243, 246-47.

Dredge relayed that William Borders had stated that as proof to the Romanos that he was the only person connected to Judge Hastings, Borders would have the judge show up at a pre-arranged time and location. Dredge also relayed, during the week of August 21, 1981, that Borders was coming again to Miami to meet with Santo Trafficante or Judge Hastings. FBI surveillance teams observed that on August 21, 1981, Borders flew to Miami, took a taxi to the Fontainebleau Hotel, got out of the cab, and got into a car driven by Trafficante, who thereupon drove him back to the airport. They spoke for five to ten minutes at the terminal and Trafficante left.[31]

On August 27, 1981, the Fifth Circuit handed down the case of United States v. Peacock,[32] which followed the Martino opinion. The Peacock decision did not have any additional precedential significance with respect to the forfeiture issue in Romano, for once the Martino opinion had been issued, it was the law of the circuit until it was either reversed or overruled by the entire Fifth Circuit en banc. One Fifth Circuit panel must follow a prior decision of another Fifth Circuit panel.[33]

Having twice corroborated William Dredge's statements regarding William Borders and Santo Trafficante, the Government attempted to enlist Dredge's cooperation in investigating the alleged bribery schemes in Judge Hastings' courtroom. Dredge refused to cooperate in an investigation of the Trafficante bribery deal because he feared for his and his family's welfare -- fears that the FBI believed were justified. Dredge was willing, however, to introduce Borders to an undercover agent posing as one of the Romano brothers.[34]

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[31] 93-94, 243-44, 247-49, 369; HX. 71; PT of Richard Lowe at 449.

[32] 654 F.2d 339 (5th Cir. 1981).

[33] 59, 632; HX. 121; S.111.

During late August and early September, 1981, William Dredge was in contact with Borders and told him that the Romanos were interested in the bribery scheme. He advised the FBI that Borders was anxious to do the Romano deal, but that he would only deal with one or both of the Romanos. On September 10, 1981, Dredge, in the presence of Special Agent Murphy, telephoned Borders and told him that the Romanos were ready to meet and make a deal. Arrangements were made for Dredge to meet Borders at the Miami International Airport on Saturday, September 12 at 8:00 a.m., and introduce him to "Frank Romano," who was to be impersonated by retired FBI agent, H. Paul Rico.[35]

Earlier that day, Judge Hastings had called Borders. He had left a message that he would be in chambers between 4:30 and 5:00 p.m. to receive Borders' call. After Borders and Dredge set up the first meeting with "Frank Romano," Borders called Judge Hastings at 4:40 p.m. Then, at 5:10 p.m., Judge Hastings left the following message at William Borders' office: "He'll be waiting for call - Have them get him off the bench[.] He'll also let them know if you call to get him to phone." At 5:34 p.m., a four minute call was made from William Borders' law office to Judge Hastings' chambers.[36]

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[34] 94-95, 249.

[35] 92-95, 250-53; HXs. 11d, 205.

The next day, Friday, September 11, 1981, Judge Hastings was scheduled to fly from Miami to Washington, D.C., leaving Miami at 3:48 p.m. This flight, however, was delayed and Judge Hastings called Borders' office twice to advise Borders of that fact. The judge did not arrive at Washington National Airport ["National"] until about 8:00 p.m., two hours after his original scheduled arrival time.[37]

On the same day, Borders was scheduled to leave National for Miami at 7:30 p.m., in order to make his meeting at 8:00 the next morning with Dredge and "Frank Romano." Borders, however, changed his flight to leave at 9:20 p.m., thereby arriving in Miami at 1:30 a.m. on September 12. This change created a clear opportunity -- a period of over an hour -- when Judge Hastings and Borders could have met at National, although no one actually observed such a meeting. Judge Hastings did not check into the Washington Sheraton Hotel until 10:14 p.m., over two hours after he arrived in Washington, D.C.[38]

The next morning, September 12, 1981, Borders met Dredge and the man who he thought was Frank Romano at the Miami airport. The undercover agent, H. Paul Rico, was wearing a body recorder and recorded the conversation with Borders. At the meeting, Borders stated that he understood that the Romanos had "lost some property." He advised Rico that 10 days after receiving a payment of $150,000, an order would be signed returning a "substantial amount" of the property and thereafter, they were to withdraw their appeal and something would be done about their jail sentences. When Rico raised the issue of "how do I know," Borders responded, "checks and balances." Borders said, "I don't get nothin', until the first part is done. . .that will be a signal showing you that I'm, I know what I'm talking about, right?"[39]

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[36] HX. 28; S.35-38.

[37] 2240-41; HXs. 30, 31d, 32; S.39-42.

[38] 258; HXs. 33-35, 37, 99; S.43-44, S.46.

Rico noted that the main concern for himself and his brother was the "time," i.e., not being imprisoned. To further satisfy Rico that he could deliver on his promises, Borders proposed that the money be placed in escrow with Dredge and that Borders would only receive the money after the order came down. Rico said he preferred not to use Dredge and, aware that Borders had previously stated that he could prove his influence with Judge Hastings by having him show up at a given time and place, Rico proposed verification in this manner. Rico asked if Borders wanted to get back to him with the time. Borders said that was unnecessary and immediately selected Wednesday, September 16, 1981, as the date for Judge Hastings' appearance. Rico selected the main dining room in the Fontainebleau Hotel in Miami Beach at 8:00 p.m.[40]

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[39] 95, 258, 271, 286-87, 403-04, 409-10, 412, 415, 418-19, 424-25; HXs. 38a-b.

[40] 272-73, 412, 424-25; HXs. 38a-b.

Borders and Rico agreed to meet the following Saturday, September 19, 1981, at the Miami airport, at which time Rico would make an "up front" payment on the bribery deal. At the conclusion of their meeting Borders assured Rico, saying "that's 100 percent, 100 percent, 100 percent."[41]

At the time of his conversation with Rico about the status of the Romano case, William Borders had no official connection with the case. He neither participated in the case nor had filed a notice of appearance as counsel. He was not a member of the Florida bar. He never called Judge Hastings' secretary to obtain information about the Romano case. Nor did he know the law clerk, Jeffrey Miller.[42]

When Borders finished his meeting with the undercover agent, he flew from Miami to West Palm Beach and drove to a long-planned family reunion. He stayed there only about an hour, however, and almost as soon as he arrived, started making a complex series of reservations and cancellations of airplane flights back to Washington, D.C. He drove to two different cities, Melbourne and Orlando, in his attempt to fly back to Washington that day. Ultimately, Borders flew from Orlando, Florida to Baltimore-Washington International Airport ["BWI"], arriving at 8:58 p.m.[43]

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[41] 273-74; HXs. 38a-b, 43a-b.

[42] 25, 1753; S.58. Moreover, Judge Hastings denies ever discussing the Romano case, even innocently, with Borders. HX. 156 (at 2064-65).

[43] 427-29; HXs. 72-74; S.60, S.62, S.66, S.71-72, S.254-56; PT of Laverne Boone at 494-95, PT of Richard Lowe at 452.

Judge Hastings was spending that weekend of September 11-13, 1981, in Washington, D.C. at the Sheraton Hotel. Jesse McCrary, his close friend who had represented William Dredge, registered at the Sheraton Hotel on the 12th in the room next to Judge Hastings.[44]

Around 9:00 p.m. on Saturday, September 12, 1981, Borders landed at BWI. From there he went to the Sheraton Hotel in Washington, arriving at Judge Hastings' room at 10:00 p.m. When Borders arrived, Judge Hastings, Jesse McCrary and three women -- two sisters, Pearl and Margaret Dabreau, and Donna Mendez Myrill -- were in the judge's room. The group had not yet had dinner. Donna Mendez Myrill testified before the Impeachment Trial Committee that either Judge Hastings or Jesse McCrary had told her they were waiting for William Borders, whom Ms. Myrill also knew. She further testified that when Borders arrived, Judge Hastings was not surprised. Likewise, Pearl Dabreau recalls that the group in Judge Hastings' Sheraton Hotel room were waiting for something. And, Jesse McCrary remembers that the group was sitting, talking, doing nothing and waiting. After Borders arrived, the entire group went to dinner.[45]

On Tuesday, September 15, 1981, Borders and a friend, Madeline Petty, flew from Washington, D.C. to Las Vegas, Nevada to attend the Sugar Ray Leonard-Tommy Hearns championship fight scheduled for Wednesday, September 16. This trip had been planned as a birthday present for Ms. Petty; the plane tickets had been purchased two weeks earlier on September 1, 1981. It was Borders' usual practice to attend major fights, and he had told many people that he was going to Las Vegas, including his secretary, Cynthia Rogers; Hemphill Pride; and even H. Paul Rico, the undercover agent posing as Frank Romano.[46]

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[44] 2242; S.73-74.

[45] 511-12, 515-17, 1455, 1460-62, 1724-25, 1727, 2242, 2244-46; HXs. 156 (at 1840-41, 2110-11), 205, 227.

September 16, 1981 was also the date Borders and Rico had agreed that Judge Hastings would appear at the main dining room of the Fontainebleau Hotel at 8:00 p.m. in order to prove that the judge was in on the bribery deal. FBI agents had the hotel under surveillance. Shortly before 8:00 p.m., Judge Hastings and a woman named Essie Thompson were observed entering the Fontainebleau Hotel, looking around the hotel and walking into the dining room.[47]

Judge Hastings testified at his criminal trial and before the Impeachment Trial Committee that Borders had promised to meet him at the Fontainebleau that night but had not shown up. According to Judge Hastings, his appearance was not part of the Romano bribery scheme. However, neither during their telephone conversations arranging the dinner, nor during the evening itself, did Judge Hastings ever mention Borders to Ms. Thompson or indicate that they were meeting anyone. Nor did Ms. Thompson ever hear the judge tell the hostess or waiter that he intended to meet Borders or anyone else that evening. Judge Hastings had made reservations for two. When the maitre d' seated them at a table for four and removed two place settings, he did not protest. And, sometime after they ordered drinks but before their dinner was served, Judge Hastings left the table and walked to a lounge area of the hotel. When he returned to the table, Judge Hastings told Ms. Thompson that he had been "looking for some friends from D.C." However, Judge Hastings did not check other restaurants in the hotel. Nor did he have Borders paged.[48]

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[46] 273-74, 732-34, 843-46; HXs. 38a-b, 39, 40; S.77-79; PT of Madeline Petty at 858.

[47] 272-73, 517-22, 2247-48; S.86, S.89.

Borders, of course, was in Las Vegas at the championship fight. He and Ms. Petty returned to Washington, D.C. two days later, on Friday, September 18, 1981, between 8:00 and 9:00 p.m. At the airport, Borders and Ms. Petty parted company. Borders took a 9:20 p.m. flight to Miami, in order to make his arranged meeting with Rico the next morning for the "up front" payment on the bribe.[49]

H. Paul Rico had not told William Borders that Judge Hastings had appeared at the Fontainebleau Hotel on September 16, as promised. Borders nevertheless proceeded directly from National to Miami for his rendezvous with Rico as if he knew that the signal confirming Judge Hastings' involvement had been given.[50]

On Saturday morning, September 19, 1981, at 10:00 a.m., Borders and Rico again met at the Miami International Airport. Rico was wearing a body recorder. After an exchange about the

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[48] 518-22, 2248-49, 2315, 2371-74; S.86, S.89.

[49] HXs. 41-42, 75-76; S.90.

[50] 409-10; HXs. 41-42, 75-76; S.90.

Leonard-Hearns fight, the undercover agent said: "You did what you said you'd do." Borders acknowledged this and Rico continued, "Your man arrived and in fact, he arrived a little early and, ah, you said you could do that, and that's ah, your end of the situation." Borders then asked, "What is it in?" and Rico replied that it was just in an envelope. Rico said he would put it inside a newspaper and give it to Borders. The undercover agent then said "[B]efore we go any further, the last time we talked my understanding was that, ah, some property was going to be released." Borders said the property would be released within 10 days. He told Rico, "Once you do that then file a motion for mitigation of sentence." Borders said, "Just tell him [the attorney] you're tired of the appeal, just see if the man will reduce the sentence."[51]

The two men then separated and Rico went to get $25,000 in cash which had been placed in a locker. The undercover agent returned and placed the newspaper containing the envelope with the money on the arm of a sofa. Borders picked up the newspaper. There was further conversation, and Borders told Rico that the money would cover a reduction in sentence for both Romanos. They then discussed when the balance of the bribe would be paid. Borders suggested it be paid as soon as the order was entered returning the forfeited money. Rico proposed another installment payment, then full payment "on the culmination," i.e., when the sentences were reduced. Borders objected that this was not the deal. He again proposed that the money be put in escrow with Dredge. Rico rejected that idea. They finally agreed that on October 3, 1981, after Judge Hastings issued the order returning a substantial amount of Romano property, the remaining $125,000 would be paid.[52]

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[51] 274, 286-88, 407-08, 409-10, 413-14; HXs. 43a-b.

There was no further contact between Borders and the undercover agent between September 19 and October 2, 1981. The order returning a substantial portion of the forfeited property was not issued within 10 days of September 19 as Borders had promised.[53]

On October 1, 1981, a lawfully authorized wiretap was placed on William Borders' business phone, and on Friday, October 2, 1981, a similar tap was placed on his residential phone. Rico placed four calls on Friday, October 2, to Borders' office. Borders was out, but he arranged to have a call patched through to him. At 3:11 p.m., Rico spoke to Borders and told him nothing had happened regarding the order. Borders replied "I think it has. . .I'll check into it," and then suggested they cancel the scheduled October 3, 1981 meeting for the final payment. Borders said he was not sure he would be able to call Rico back that night; he explained he did not know if he could find out "because of the time." They agreed that Rico would call Borders at home two days later, Sunday, October 4, 1981.[54]

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[52] 288, 407-08, 414-15; HXs. 43a-b.

[53] 288, 409-10.

[54] 287-97; HXs. 44a-b, 45a-b, 47a-b, 48a-b, 49a-b, 50a-b; S.101, S.103.

By 4:50 that Friday afternoon, Borders was back in his office. In a call recorded by the FBI, Borders' secretary called Judge Hastings' chambers and was told that Judge Hastings had left for the day.[55]

On Sunday morning, October 4, Rico called Borders as agreed to find out the status of the order. Borders explained, "I have not, ah, gotten an answer, cause I haven't been able to talk to anybody." He then asked Rico to call back the next day. That afternoon William Borders called Judge Hastings and left a message for him to return the call.[56]

On Monday morning, October 5, 1981, Judge Hastings told his law clerk, Jeffrey Miller, to finish that day the Romano order returning a substantial amount of forfeited property. Miller testified that Judge Hastings' request was unusual. Judge Hastings had never before asked Miller to prepare an order in Romano the very same day. Moreover, Miller went home to work on the order.[57]

At 4:22 p.m., on October 5, 1981, Rico again called William Borders. He said he was anxious. Borders said he understood, that he had checked on the matter, that the order had not gone out yet, but "that's been taken care of." Borders said it probably went out that day, the 5th, or would go out first thing in the morning, on the 6th.[58]

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[55] HXs. 51a-b; S.107.

[56] 2252-53; HXs. 52a-b, 156 (at 1846); S.109.

[57] 621-22, 2286, 2377.

Less than one hour later, at 5:12 p.m., Judge Hastings called William Borders and the following conversation occurred:

> **BORDERS:** Yes, my brother.
>
> **JUDGE HASTINGS:** Hey, my man.
>
> **BORDERS:** Um hum.
>
> **JUDGE HASTINGS:** I've drafted all those, ah, ah, letters, ah, for Hemp. . .
>
> **BORDERS:** Um hum.
>
> **JUDGE HASTINGS:** . . . and everything's okay. The only thing I was concerned with was, did you hear if, ah, you hear from him after we talked?
>
> **BORDERS:** Yea.
>
> **JUDGE HASTINGS:** Oh. Okay.
>
> **BORDERS:** Uh huh.
>
> **JUDGE HASTINGS:** Alright, then.
>
> **BORDERS:** See, I had, I talked to him and he, he wrote some things down for me.
>
> **JUDGE HASTINGS:** I understand.
>
> **BORDERS:** And then I was supposed to go back and get some more things.
>
> **JUDGE HASTINGS:** Alright. I understand. Well then, there's no great big problem at all. I'll, I'll see to it that, ah, I communicate with him. I'll send the stuff off to Columbia in the morning.
>
> **BORDERS:** Okay.
>
> **JUDGE HASTINGS:** Okay.
>
> **BORDERS:** Right.

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[58] 307-09; HXs. 53a-b; S.115.

JUDGE HASTINGS: Bye bye.

BORDERS: Bye.

This was a coded conversation intended to convey information concerning the bribery scheme. Judge Hastings was confirming that the deal was still on before signing and sending out the forfeiture order, returning over $800,000 of Romano property. Judge Hastings testified at his criminal trial and before the Impeachment Trial Committee that it was not a coded conversation, but rather a discussion about some letters he was drafting to help Hemphill Pride. The House of Representatives submitted the tape recording and the transcript of this conversation to a recognized expert in the field of linguistics, Professor Roger Shuy of Georgetown University, who analyzed the conversation and concluded that Judge Hastings and Borders were using a code.[59]

The next day, on October 6, Judge Hastings issued an order that returned $845,000 of the $1,162,016 worth of Romano property previously ordered forfeited. Jeffrey Miller had returned to chambers that day with the final draft, which the secretary typed. Judge Hastings had then put pressure on his staff to get the order out that day. He told Marilyn Carter, his deputy clerk, "Sorry for the rush, but this must go out today." Ms. Carter felt pressure from the judge to drop other work and to get the Romano order out. She also could not understand why there was such a rush, for the order did not involve a time limit. Unlike any other order or correspondence in the Romano case, the October 6 order went out special delivery.[60]

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[59] 534, 536-37, 605; HXs. 54a-b; S.117.

In that order, Judge Hastings reversed in large measure his forfeiture order of May 4, 1981. The new forfeiture order was inconsistent with his prior ruling from the bench on July 8, 1981, even though the law had not changed since July and there had been no further filings or proceedings pending before him. The October 6, 1981 order was consistent with the bribery scheme set up by William Borders and Rico -- it returned a substantial amount of the Romanos' forfeited property, and it did so within days of the series of phone calls between Rico, Borders and Judge Hastings.[61]

Rico called Borders at mid-day on October 7 inquiring again about the status of the order. This time Borders said "it went out yesterday morning." This assertion corresponds to Borders' October 5 conversation with Judge Hastings in which the judge said he would send out "the letters in the morning." That night Rico called Borders back to tell him he had received word that the order had been issued. They discussed arrangements for the final payoff. Rico offered to travel to Washington, D.C. on Thursday or Friday, October 8 or 9. Borders agreed and told Rico to call him when he got to town.[62]

The National Bar Association had scheduled a testimonial dinner in honor of William Borders, a past president of the organization, for October 9, 1981, in Washington, D.C. Judge Hastings was one of the sponsors of the dinner. On the morning of October 8, 1981, Borders received a call from Judge Hastings who stated that he would be arriving in Washington the next day at 10:40 a.m. Judge Hastings told Borders he was staying at the Washington Hilton, although he would prefer to be at the L'Enfant Plaza Hotel. Borders said he could always get Judge Hastings in there.[63]

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[60] 1744-45, 1768, 1784-85, 1789, 2378-79; HXs. 8; S.118.

[61] 40-41; HXs. 43a-b.

[62] 309-17; HXs. 54a-b, 56a-b, 60a-b; S.123.

Borders picked up Judge Hastings at National on the morning of October 9. They drove from the airport to the L'Enfant Plaza Hotel where a suite and an adjoining room were assigned to them. While at the hotel, Judge Hastings sent a suit to the valet service. They stopped briefly to see Hemphill Pride, who was also staying at the L'Enfant Plaza Hotel for the NBA event. Judge Hastings and Borders then left the hotel and after a couple of intermediate stops arrived at Borders' office where Borders had a message to call "Frank" [Rico] at the Twin Bridges Marriott Hotel. Borders called, and Rico told Borders he had "brought all the necessary papers." Rico and Borders agreed to meet at the Marriott in about an hour.[64]

When Borders arrived at the Marriott, he told Rico, who was wearing a recording device, to "get it" because he wanted to take a ride. Borders and the undercover agent got into Borders' car, with a bag containing $125,000 in 100 dollar bills on the seat between them. As they started to leave the parking lot, the FBI pulled them over and arrested Borders.[65]

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[63] 2237; HXs. 61a-b; S.126-29.

[64] 321, 691-92, 2260-63; HXs. 62a-b, 64a-b, 129; S.130-133, S.136, S.167.

Prior to October 9, 1981, the Public Integrity Section of the U.S. Department of Justice, in consultation with the FBI, had decided to arrest William Borders and seek his cooperation some time after he received the final $125,000 payment on the bribe. The Government decided to make the arrest as Borders was driving away from the Marriott Hotel because of a fear for Rico's safety. The FBI had no way of knowing where Borders was going with the retired agent, and Rico was not wearing a transmitter. In addition, neither the Public Integrity Section, nor the FBI, believed that Borders would pass any of the $125,000 directly to Judge Hastings. Instead, being sophisticated, they would pass the money in a manner that could not be traced. The upfront $25,000 that was paid to Borders on September 19, 1981 was never found.[66]

Borders was arrested just before 1:00 p.m. At 1:18 p.m., Borders requested and received permission to telephone his attorney, John Shorter. Shorter arrived at the Marriott at 1:31 p.m. After speaking privately with his attorney, William Borders stated that he would not cooperate with the Government.[67]

At 1:55 p.m., Special Agent Murphy left for Borders' law office to locate and interview Judge Hastings. Two other agents accompanied him in order to serve a subpoena for documentary records. The agents entered the office at 2:40 p.m. and discovered that Judge Hastings was no longer there. They presented the subpoenas to Borders' secretary, who was uncertain how to deal with the situation. She contacted Shorter, and Agent Murphy explained the subpoenas to Shorter, who then told the secretary to accept them.[68]

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[65] 313-17, 317-21, 324, 328; HXs. 65a-b, 66; S.142.

[66] 317-21, 324, 376-77, 404, 407.

[67] 398-99; HX. 66; S.145-46.

In addition, Special Agent Murphy told Shorter that he was trying to locate Judge Hastings in order to interview him. Special Agent Murphy asked Shorter to give his name, another FBI agent's name and the number of the FBI Washington field office to whoever might be able to get in touch with Judge Hastings.[69]

Special Agent Murphy and the other agents then proceeded to the L'Enfant Plaza Hotel. They arrived at approximately 3:00 p.m. and inquired at the front desk to learn Judge Hastings' room number. Using the house phone, the agents called Judge Hastings several times and received no response. They then went up to Judge Hastings' room and knocked on the door. Again, there was no response. After one of the agents checked the bar/restaurant area, at approximately 3:35 p.m., the FBI agents left the hotel.[70]

After William Borders had left his office to meet "Frank," Judge Hastings had also left and, after making a few stops, he had returned to his room at the L'Enfant Plaza Hotel. Judge Hastings ordered lunch from room service around 1:00 p.m. Shortly thereafter, Hemphill Pride dropped by and joined him for lunch. Afterwards, they went downstairs for drinks in the hotel's cocktail lounge. While in the lounge, there was no discussion of Judge Hastings helping Pride obtain financial assistance or reinstatement to the South Carolina bar. Nor was there any discussion of letters of support, which had been discussed by Judge Hastings and Borders in the October 5 conversation believed to be in code.[71]

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[68] 329-30.

[69] 329-30.

[70] 330.

When Hemphill Pride returned to his room, he immediately received a phone call from John Shorter who told him that William Borders had been arrested on charges involving bribery in Judge Hastings' courtroom. Shorter also told Pride that the FBI was looking for Judge Hastings to interview him, and he gave Pride the names of the two FBI agents and the FBI telephone number. Shorter asked Pride to give the message to Judge Hastings and to tell him to contact the agents. Shorter thought that Judge Hastings should have a lawyer present and suggested the name of a Washington attorney.[72]

Pride immediately called Judge Hastings and told him he had an important message and that Judge Hastings should come to Pride's room immediately. Taking his two-year old son with him, Pride met Judge Hastings outside the elevator on Pride's floor of the hotel. There Pride relayed Shorter's information. Judge Hastings was stunned and shocked by the news. He did not, however, express outrage or anger at William Borders for involving him in a bribery scheme.[73]

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[71] 691-92, 734, 2263-65.

[72] 689-94, 724.

After relaying the news, Pride and Judge Hastings decided to return to Judge Hastings' room. They took Pride's child back to Pride's room and took the elevator together. In the elevator they did not discuss Borders' arrest because other people were present; however, upon reaching Judge Hastings' room, they continued to discuss the situation. Judge Hastings kept asking Pride to repeat the information. Pride did so and also told Judge Hastings that if he had a problem he could best handle the matter in Florida with his own counsel. Judge Hastings immediately packed his clothes. He and Pride then went downstairs to the lobby of the L'Enfant Plaza Hotel.[74]

In the lobby, Pride offered to give Judge Hastings a ride to the airport; but, Judge Hastings declined, saying that Pride should not get involved because Pride was still on parole and that he would take a cab. The two men then parted. At no time did Judge Hastings give Pride money to cover any charges that Judge Hastings had incurred while at the hotel. Nor did Judge Hastings ask Pride to pick up the suit Judge Hastings had sent to the valet service. Judge Hastings left the L'Enfant Plaza on October 9, 1981, without checking out, without paying his expenses, and without picking up his suit.[75]

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[73] 693-94, 696, 2265-66, 2351-52, 2458-59.

[74] 694-96, 725-26, 2265-67, 2351.

Judge Hastings testified at his criminal trial and before the Impeachment Trial Committee that after learning of Borders' arrest from Pride, he returned alone to his room and telephoned his mother and his fiancee, Patricia Williams, in Florida. He testified that it was because of these calls that he decided to return home immediately. According to Judge Hastings, when he called his mother long distance from his hotel room, she said she had learned about William Borders' arrest and that reporters were at their apartment complex. She allegedly was hysterical and told him to "come home." Judge Hastings also testified that he called Ms. Williams who told him that she had been interviewed by the FBI and that she had called his chambers and learned the FBI was interviewing his staff. According to Judge Hastings, Pride joined him after these calls.[76]

These calls, however, were never made. Hemphill Pride testified that from the time he informed the judge of William Borders' arrest until the time they parted in the lobby of the L'Enfant Plaza Hotel, Judge Hastings was never out of his presence and the judge made no phone calls. The computer-generated record of all calls charged to rooms at the L'Enfant Plaza Hotel on October 9, 1981, does not reflect the calls Judge Hastings claims he made to his mother and Ms. Williams, and there is no evidence of a malfunction in the system. Neither the telephone records of Judge Hastings' home phone, his mother's home phone nor Patricia Williams' home phone reflect the alleged calls. And, Judge Hastings admits that he did not charge the calls to a credit card.

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[75] 695-96, 749, 830, 2265-67, 2358-59.

[76] 696-97, 2351-52, 2355-58; HX. 156 (at 1916).

There is also evidence that Judge Hastings could not have obtained the information he claims from his mother and Ms. Williams at the time he alleges to have made the calls. For example, during the relevant time period, no media people were signed in on the log of the condominium complex where Judge Hastings and his mother lived. The log must be signed in order to gain access to the complex.[77]

On the afternoon of October 9, 1981, the FBI office in Washington, D.C. advised FBI personnel in Miami to begin interviews at Judge Hastings' chambers. The agents arrived at about 2:50 p.m. and remained for approximately two and one half hours. The Miami office of the FBI also received instructions to interview Ms. Williams, Judge Hastings' fiancee. FBI agents arrived at her office a few minutes before 3:00 p.m. and began the interview shortly thereafter. Ms. Williams was interviewed by FBI agents for approximately 45 minutes. She was interrupted once by a phone call and stated to the agents upon her return that the call was from a client. The call was not from Judge Hastings.[78]

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[77] 696-97, 751, 812-13, 830-31, 2351-52, 2352-53, 2357-58; HXs. 31, 136, 137, 140, 156; S.175.

[78] 758-59, 763-65, 804; HX. 139.

The evidence indicates that Judge Hastings departed from the L'Enfant Plaza Hotel within 30 to 40 minutes of the time he learned of William Borders' arrest, at approximately 3:35 or 3:40 p.m. Airline records establish that Judge Hastings could have taken a direct flight that afternoon from Washington, D.C. to Miami, where his car was parked. There were 14 seats available on a flight, leaving National at 4:35 p.m. However, instead of traveling to National, which is located four miles from the L'Enfant Plaza Hotel, Judge Hastings went by taxi -- at a cost of $50 -- to BWI, which is 32 miles northeast of the hotel and approximately an hour away in Friday afternoon traffic.[79]

At 4:37 p.m., Judge Hastings called his mother from a pay phone at BWI and spoke for four minutes, charging the call to his home telephone. This is the first documented contact between the judge and his mother that day. At 5:06 p.m., he called Patricia Williams from a BWI pay phone, also charging the call to his home telephone. This is the first documented call from Judge Hastings to Ms. Williams that day. He spoke to her for one minute and told her to call him back at a different pay phone. When she called back at 5:07 p.m. from her home, Judge Hastings told her to go outside, find a pay telephone and call him back. She did so, calling him at 5:22 p.m. He then took her number, moved to a third pay phone and called her again. Judge Hastings admits that he engaged in this series of pay phone calls. He testified to several explanations for this conduct -- a baby was crying; he suspected government surveillance near the pay phone; he was afraid Ms. Williams' phone was tapped. He denied, however, that he went to BWI because he was trying to avoid any FBI agents who might be waiting for him at National.[80]

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[79] 329-30, 694-95, 724-25, 752, 2266-67, 2352, 2360-61; HX. 78; S.181-84, S.186.

Delta Airline records show that at 5:31 p.m. Judge Hastings made a reservation on a flight departing BWI at 6:30 p.m. for Miami with an intermediate stop in Fort Lauderdale. There is a handwritten notation on Judge Hastings' ticket crossing out Fort Lauderdale as his destination and substituting Miami. However, Judge Hastings got off the plane when it stopped in Fort Lauderdale. At the Fort Lauderdale airport, Judge Hastings rented a car because he had parked his car at the Miami airport when he had left the Florida area.[81]

Judge Hastings testified at his criminal trial and before the Impeachment Trial Committee that upon arrival in Fort Lauderdale, he went to his mother's house and then proceeded to the home of Ms. Williams. In his FBI interview that very night, however, he stated that he called his mother from the airport and drove directly to the home of Ms. Williams.[82]

During the evening of October 9, Special Agent John Simmons had received a call at home from the Special Agent in Charge of the Miami Division of the FBI, advising him that Judge Hastings had not been located in Washington, D.C. Special Agent Simmons was asked to contact another experienced agent and attempt to find Judge Hastings in the Ft. Lauderdale area.[83]

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[80] 2362-63, 2399-400; S.186-89, S.191.

[81] 2361, 2364; HXs. 134-35; S.183, S.192-95.

[82] 2364, Respondent's Exhibit (hereinafter "RX.") 42.

The first step Special Agent Simmons and his partner took was to go to Judge Hastings' home, which he shared with his mother. They arrived at approximately 11:00 p.m. and spoke to Mrs. Hastings. She told them that she had not seen her son that day, nor had she heard from him. The agents asked Mrs. Hastings to have the judge contact the Miami FBI office if she did see or hear from him.[84]

Special Agent Simmons and his partner then went to the home of Patricia Williams, who they knew was Judge Hastings' fiancee. There they found Judge Hastings. The agents arrived at about midnight and were invited in by the judge, who stated, "Gentlemen, I've been expecting you. Come on in."[85]

Prior to his interview at Patricia Williams' home late in the evening on October 9, 1981, Judge Hastings had not contacted the FBI. During the interview, he denied any involvement with William Borders in a bribery scheme. With respect to his abrupt departure from Washington, D.C., Judge Hastings said he came home because he believed he could better defend himself against allegations while on "his own turf." He did not mention any telephone calls he made from the L'Enfant Plaza Hotel to his mother and Patricia Williams.

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[83] 767.

[84] 767-68; S.198.

[85] 768.

It was the impression of Agent Simmons, who conducted the interview, that Judge Hastings answered every question immediately and spoke as if he had rehearsed his answers.[86]

On Monday, October 12, 1981, three days after William Borders' arrest, at 6:38 p.m., a telephone call was placed from Judge Hastings' home telephone to William Borders' home telephone. The call lasted two minutes.[87]

Two days later, on October 14, 1981, Ms. Williams wrote to Judge Hastings and told him that she felt "pride and joy as well as horror" as a result of their telephone conversation on Friday, October 9, when Judge Hastings called her "from Baltimore" and indicated that he wanted her legal assistance in confronting allegations of bribery which Judge Hastings had just learned were being directed against him.[88]

5. Contacts Between Judge Hastings and William Borders

Throughout 1981, as the Romano case proceeded and during the Government's investigation of the bribery scheme, there were numerous contacts between Judge Hastings and William Borders, which correspond to key events in the Romano case. The contacts are documented by telephone and airline records, message logs and by Judge Hastings' own testimony. The contacts were often of brief duration, sometimes at odd hours and on at least one occasion from and to pay telephones.

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[86] 768-69, 792, 2355, 2358-59, 2363-64; RX.42; S.196.

[87] 2271-72, 2392-93; HX. 31; S.201.

[88] 2355; HX. 230.

Analysis of these contacts reveals that most of the known telephone calls between Judge Hastings and William Borders occurred on or close to days on which (a) Judge Hastings had motions in the Romano case under active consideration, (b) he held hearings relating to the Romanos' forfeiture or sentencing, or (c) William Borders was negotiating with H. Paul Rico about the payment of a bribe. Moreover, there were only eight other telephone contacts between Judge Hastings and Borders from January through October, 1981.

The significant contacts are as follows:

1. On February 20, 1981, the day of the Romanos' forfeiture hearing, Judge Hastings called Borders early in the morning. The call lasted three minutes.[89]

2. On April 9, 1981, the day after the last memoranda relating to the forfeiture issue were filed, Judge Hastings called Borders' office. He left a message for Borders to call and said he would be "at his office between 12 and 1." At 12:15 p.m. a call was placed from a pay phone in the corridor of the third floor of the Federal courthouse in Miami, (125 feet from Judge Hastings' chambers) to a pay phone in the lobby of the Federal courthouse in Washington, D.C. The call lasted one minute or less and was charged to Judge Hastings' residence. Judge Hastings does not deny he made the call. He also testified that it might have been the result of instructions by Borders to use a pay telephone. The call was made within a day or two of when Philip "Brother" Moscato relayed Borders' message to the Romanos that there was a Washington, D.C. lawyer who could help them with their case.[90]

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[89] S.269.

[90] 197, 523-25; HXs. 31i, 198, 200, 200a, 201, 222; S.271-72.

3. Judge Hastings called Borders three times within a few days of April 23, 1981, the date the parties were advised the Romanos' sentencing was scheduled for May 11, 1981.[91]

4. On May 4, 1981, the day Judge Hastings entered his order compelling the forfeiture of $1,162,016 of Romano property, he called Borders during a morning recess and left an "urgent" message that he would be awaiting Borders' call between 12:00 and 1:00 p.m.[92]

5. The next day, May 5, 1981, Borders flew to Miami, arriving at 3:58 p.m. He was scheduled to depart at 6:50 p.m. The same day, Judge Hastings was scheduled to depart Miami at 6:55 p.m. Both were departing from the Eastern Airlines terminal of the Miami airport.[93]

6. Judge Hastings called Borders four times between May 5 and the scheduled time of the Romanos' sentencing on May 11, 1981: once after midnight on May 6 from Madison, New Jersey; once on May 7 at 4:30 p.m. when Judge Hastings left a message for Borders to call him at 7:00 a.m. the next morning; and twice before 7:00 a.m. on May 11. Two of the calls (on May 7 and May 11) were to the home of Borders' girlfriend. On May 11, Judge Hastings postponed sentencing.[94]

7. On May 31, 1981, Borders called Judge Hastings twice: at 7:53 a.m. and 8:27 a.m. The day before, William Dredge had been in Washington, D.C. The day after the calls, the Romanos' sentencing was rescheduled for July 8, 1981.[95]

8. Judge Hastings sentenced the Romanos on July 8, 1981. On July 5, 7 and 9, Judge Hastings called Borders. The July 5 and 7 calls each lasted less than one minute. On July 9, Judge Hastings left a message for Borders. Between July 7 and 9, Dredge was in Washington, D.C. and overheard conversations about a bribery

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[91] HXs. 212-14; S.277-78.

[92] S.279.

[93] HXs. 90-91, 93, 98, 106-07; PT Laverne Boone at 474-76, 482, 484-94.

[94] 843-46, 2346; HXs. 4, 31h, 197, 215; S.19, S.280; PT of Madeline Petty at 879.

[95] HX. 196b.

deal involving Santo Trafficante. The following weekend Borders met Judge Hastings in Miami.[96]

9. During late August and early September, 1981, William Dredge told Borders that the Romanos might be interested in a deal. On August 31, 1981, at 5:42 p.m., Dredge called Borders. On September 1, 1981, at 11:36 a.m., Borders called Judge Hastings.[97]

10. On September 10, 1981, the same day that Dredge and Borders arranged the first meeting with "Frank Romano," there was a series of calls between Borders and Judge Hastings. The calls occurred both before and after Dredge and Borders arranged the meeting.[98]

11. On September 11, 1981, the day before Borders was to meet Rico for the first time, Judge Hastings called Borders twice to tell him his flight was delayed. There was an hour and 15 minute period during which Judge Hastings and Borders could have met at National because Borders had delayed his flight to Miami.[99]

12. On September 12, 1981, after meeting for the first time with Rico and setting up the bribery deal, Borders went to great lengths to return to Washington, D.C. and arrived at Judge Hastings' Sheraton Hotel room sometime after 10:00 p.m.[100]

13. On September 20 or 21, 1981, Borders called Judge Hastings, one or two days after the upfront payment on the bribe of $25,000 was paid to Borders by Rico on September 19.[101]

14. On October 2, 1981, after telling Rico that he would check on the promised order vacating the forfeiture order, Borders called Judge Hastings' chambers and asked to speak with the judge.[102]

15. On Sunday, October 4, 1981, the day Borders told Rico that he had not been able to reach anyone about the order, Borders

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[96] 87-91, 1459-60, 2231; HXs. 110, 156 (at 2090-92), 205; S.25, S.284-86.

[97] 94, 251; HXs. 11d, 27b.

[98] HX. 28; S.35-38.

[99] 2240; HXs. 31d, 32; S.41.

[100] HXs. 31d, 32-35; S.41-42, S.44.

[101] 2376; S.288.

[102] HXs. 51a-b; S.107.

called Judge Hastings' residence and left a message for the judge to call.[103]

16. On October 5, 1981, Judge Hastings told his law clerk to get the Romano order out that day. At 5:12 p.m. the same day, Judge Hastings called Borders and had the coded conversation.[104]

17. On October 8, 1981, Judge Hastings called Borders and arranged to stay at the same hotel when he came to Washington, D.C. on October 9, 1981. October 9 was the day Rico was to make the final payment on the bribe.[105]

18. On October 9, 1981, William Borders picked Judge Hastings up at the airport. They spent the morning together. Around noon, Borders left Judge Hastings in order to meet Rico for the final payment of the bribe.[106]

19. Three days after Borders' arrest, on October 12, 1981, a call was placed from Judge Hastings' home phone to Borders' home phone. The call lasted two minutes.[107]

6. Pre-trial and Trial Proceedings

Following William Borders' arrest on October 9, 1981, a grand jury in the Southern District of Florida began hearing evidence on the bribery conspiracy. On December 29, 1981, the grand jury returned an indictment against Borders and Judge Hastings, charging both men with conspiracy and obstruction of justice. Borders was also charged with two counts of interstate travel to carry out the bribery scheme.[108]

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[103] 2252-53; HX. 156 (at 1846); S.109.

[104] HXs. 54a-b; S.117.

[105] HXs. 61a-b; S.126.

[106] 2261-64.

[107] 2271-72, 2392-93; HX. 31; S.201.

[108] S.202-04.

On January 4, 1982, the case was assigned to Judge Edward T. Gignoux, then Chief Judge of the United States District Court for the District of Maine, sitting by designation. He ordered reciprocal discovery, which called for each of the parties to produce for the other side those documents it intended to rely upon at trial. The prosecution produced its documents on January 19, 1982, including the tapes of the intercepted telephone calls between Judge Hastings and Borders. Therefore, as Judge Hastings admits, at least as early as January, 1981, the judge was aware that the subject of the October 5, 1981, taped conversation, purportedly the "letters for Hemp", was critical to his defense.[109]

Judge Hastings produced his reciprocal discovery on February 12, 1982. At that time, he did not produce any letters or drafts of letters about or to Hemphill Pride.[110]

In January, 1982, at the request of William Borders, Hemphill Pride met with John Shorter, Borders' attorney. At that meeting, Shorter asked Pride to listen to the October 5, 1981 tape recording and to read the transcript. Shorter did not explain where or when the conversation took place. Pride did as asked and during the third time listening to the tape, he discovered that the tape referred to "Hemp," where the transcript read "him." Pride then realized that the taped conversation had to do with writing "letters for Hemp."[111]

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[109] 892, 2385-86; HXs. 150-51; S.205, S.207.

[110] 2386; HX. 152; S.208-09.

After making this discovery, Pride told John Shorter that he was not going to be part of any defense or plan that involved the writing of letters.[112]

In late January, 1982, following his meeting with John Shorter, Hemphill Pride met with Judge Hastings in Columbia, South Carolina at Judge Hastings' request. Judge Hastings' principal attorney at that time, Joel Hirschhorn, was concerned about his client meeting alone with Pride and therefore arranged for a local attorney, Jack Swerling, to attend the session. During the meeting there was no discussion of the "letters for Hemp" referred to in the October 5, 1981 conversation.[113]

When the conference concluded, Pride insisted on driving Judge Hastings to the airport. During that trip, Pride asked the judge about the letters he had heard referred to in the October 5 taped conversation. Judge Hastings told Pride it was important for Pride to recall that the judge was drafting letters of support for him. When Pride told the judge that he knew of no such letters and, if he had, he would have stopped the effort, Judge Hastings replied that Pride would not have had to know about it. Judge Hastings tried to convince Pride that his and Borders' efforts were legitimate. Pride refused to endorse Judge Hastings' suggestion and disavowed any connection with the letters of support. He told Judge Hastings that the letter writing defense was not "going to fly."[114]

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[111] 697-99; HX. 127.

[112] 717-18.

[113] 700-01, 703, 2297.

Hemphill Pride unequivocally testified before the Impeachment Trial Committee that, in 1981, neither Judge Hastings nor William Borders offered letters in support of Pride's reinstatement to the South Carolina bar or to obtain financial assistance. The men had not obtained Pride's permission to write such letters, they had never discussed with Pride any letters, nor had Pride requested or solicited such letters from Judge Hastings or William Borders. Moreover, Pride testified that he never wrote "some things down" for Borders as referred to in the October 5, 1981 conversation between Judge Hastings and Borders, nor was Borders supposed to "go back and get some more things."[115]

Hemphill Pride also unequivocally testified that he would not have wanted letters of support from persons outside of South Carolina. He felt that his indefinite suspension from the South Carolina bar was a local problem, which he had under control. In 1981, Pride had begun taking steps to mend fences with South Carolina judges whom he had offended, and he believed that outside letters would have hurt rather than helped his cause.[116]

On February 1, 1982, Judge Hastings filed suit to enjoin his criminal case on the ground that a sitting Federal judge had to be impeached before a criminal prosecution could proceed. Although his position was eventually rejected,[117] Judge Hastings' case was stayed pending the outcome of the litigation, thereby prompting Judge Gignoux to sever Judge Hastings' trial from that of William Borders.[118]

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[114] 702, 718-21, 729-31.

[115] 681-82, 705-06, 718.

[116] 682, 717-18.

Borders was tried in Atlanta, Georgia, from March 22 until March 29, 1982. Neither Borders nor Judge Hastings testified. One of Judge Hastings' defense counsel, however, did attend the trial, thereby enabling the judge to gain a preview of the Government's evidence against him. Borders was convicted on all counts.[119]

Following the Court of Appeals' rejection of his challenge to the prosecution, Judge Hastings' case was set for trial. Approximately one month before trial, on December 13, 1982, Judge Hastings (now represented only by himself and Patricia Williams) for the first time disclosed to the prosecution the "letters for Hemp," which consisted of three yellow legal pad sheets, comprising three handwritten letters, one addressed to Hemphill Pride, and the other two addressed generally to friends and supporters from whom Judge Hastings was requesting either financial assistance for Pride or letters of support to be sent to the South Carolina Supreme

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[117] United States v. Hastings, 681 F.2d 706 (11th Cir. 1982).

[118] S.212-13.

[119] 2306; S.215, S.218.

Court, to be used to assist Pride in gaining readmission to the South Carolina bar.[120]

The prosecution submitted the letters to forensic experts in an attempt to date the creation of the letters. None of the forensic experts could date the drafts. The paper and ink employed were such that it was impossible to conclude when the letters were written. Likewise, tests to reveal impressions on the paper other than the visible writing revealed nothing that could date the letters.[121]

Judge Hastings' criminal trial, conducted in Miami, Florida, began on January 19, 1983 and continued for 12 days. Judge Hastings took the stand as the final witness in his defense. In an effort to obtain an acquittal, Judge Hastings knowingly testified falsely about the events detailed above in 14 different instances.[122]

Three times Judge Hastings unequivocally denied that he participated in a conspiracy with William Borders:

> 1. Judge Hastings testified that he and Borders did not agree to solicit a bribe from the Romanos.
>
> 2. Judge Hastings testified that he and Borders did not agree that Judge Hastings would modify the Romanos' sentences from a prison term to probation in exchange for the bribe.

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[120] 900, 2309, 2387-88; HXs. 148, 153-54; S.219-20.

[121] 922-23, 925-26; HXs. 145, 147.

[122] 715, 892-94, 1482-83, 2355, 2389-92; HXs. 27a, 137 (at 221), 148, 156 (at 1841, 1846, 1848-50, 1854, 1914-16, 1922-24, 1969, 2009, 2033, 2047-52, 2057-58, 2107-08, 2111, 2139, 2180, 2182, 2185, 2187-88, 2216, 2224), 210, 211, 230; S.225, S.228; PT of Andrew Chisholm at 970-71, 978, PT of Carolyn McIver at 931-32, 949-50, PT of Eleanor-Golar Williams at 1003, 1007.

3. Judge Hastings testified that he and Borders had never agreed that Judge Hastings would set aside the May 4, 1981 forfeiture order after a payment on the bribe.[123]

Eleven times, Judge Hastings knowingly lied under oath about particular evidence in an attempt to hide from the jury his participation in the bribery scheme. Judge Hastings testified as follows:

1. He was surprised by Borders' arrival at his room at the Sheraton Hotel on September 12, 1981.[124]

2. He expected to meet Borders at the Fontainebleau Hotel on September 16, 1981.[125]

3. On October 5, 1981, he told his law clerk to prepare the order in the Romano case primarily because the law clerk would be leaving his employment shortly.[126]

4. His October 5, 1981, telephone conversation with William Borders was about writing letters for Hemphill Pride rather than about the conspiracy to solicit a bribe in the Romano case.[127]

5. The "letters for Hemp" were written on October 5, 1981.[128]

6. On May 5, 1981, he talked to Hemphill Pride by placing a telephone call to 803-758-8825 in Columbia, South Carolina.[129]

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[123] HX. 156 (at 2058, 2107-08).

[124] HX. 156 (at 1841, 2111).

[125] HX. 156 (at 2009, 2057).

[126] HX. 156 (at 1969, 2139).

[127] HX. 156 (at 1846, 1848-50, 1854, 2180, 2182, 2185, 2187-88).

[128] HX. 156 (at 1854).

[129] HX. 156 (at 2048-49).

7. On August 2, 1981, he talked to Hemphill Pride by placing a telephone call to 803-782-9387 in Columbia, South Carolina.[130]

8. On September 2, 1981, he talked to Hemphill Pride by placing a telephone call to 803-758-8825 in Columbia, South Carolina.[131]

9. The telephone number 803-777-7716 was a number at which Hemphill Pride could be reached in July, 1981.[132]

10. On the afternoon of October 9, 1981, he called his mother and Patricia Williams from his room at the L'Enfant Plaza Hotel, and the information he learned from those phone calls was why he left Washington, D.C.[133]

11. He took a plane from BWI rather than National because he did not think there were direct flights to Miami from National at that time.[134]

On February 4, 1983, the jury acquitted Judge Hastings of the criminal charges. That acquittal, however, was obtained by fraud. The impact of the jury verdict on this impeachment proceeding is discussed in the concluding section of this memorandum.

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[130] HX. 156 (at 2051-52).

[131] HX. 156 (at 2048-49).

[132] HX. 156 (at 2033).

[133] HX. 156 (at 1914-16, 2216).

[134] HX. 156 (at 1922-24, 2224).

B. ARGUMENT: ARTICLE I

> **From some time in the first half of 1981 and continuing through October 9, 1981, Judge Hastings and William Borders, then a Washington, D.C. attorney, engaged in a corrupt conspiracy to obtain $150,000 from defendants in United States v. Romano, a case tried before Judge Hastings, in return for the imposition of sentences which would not require incarceration of the defendants.**
>
> **Wherefore Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.**

The House of Representatives submits that the evidence overwhelmingly supports Article I of the Articles of Impeachment: Judge Hastings conspired with William Borders to obtain a $150,000 bribe from the Romano brothers in exchange for the imposition of non-prison sentences. This conspiracy began as early as March of 1981 when William Borders approached William Dredge in an attempt to learn the reputations of the Romanos, and continued through October 9, 1981, when Judge Hastings fled Washington, D.C. after learning of Borders' arrest. At each stage of the conspiracy there is significant evidence of Judge Hastings' complicity which cannot be explained away.

That William Borders was involved in a scheme to obtain $150,000 from the person he believed to be Frank Romano is beyond dispute. Borders' conduct and conversations in furtherance of the scheme were observed and recorded by the FBI. The issue before the Senate is whether Judge Hastings was in on the deal. The House submits that the evidence overwhelmingly establishes that indeed the judge was a co-conspirator.

1. Pattern of Contacts

The initial evidence that incriminates Judge Hastings is the repeated, documented contacts between the judge and William Borders which correlate precisely with key events in both the Romano case and the bribery deal. For example, the day after Dredge tells Borders that the Romanos are interested (documented by a call from Dredge to Borders on August 31), Borders calls Judge Hastings. On the very day Borders and Dredge set up the first meeting with Rico, there is a series of calls between Borders and the judge. When Borders and Rico actually meet and set up the deal, within hours Judge Hastings and Borders are together. And, when Rico asks after the Romano order, Borders immediately contacts the judge. These are only some of the incriminating contacts between the two men. In 1981, nearly all of the documented contacts between Judge Hastings and William Borders occur around significant events in the Romano case and the bribery conspiracy.

The Statement of Facts above includes a list of the contacts between Judge Hastings and Borders that raise more than a mere suspicion about the role Judge Hastings played in the bribery scheme. In addition, the House has attached to this memorandum, as Attachment A, its Master Chronology, which graphically illustrates the correlation between events in the Romano case, events of the bribery conspiracy and Judge Hastings' and Borders' conduct throughout the relevant time period. The House submits that the Master Chronology damages Judge Hastings beyond repair.

It undermines Judge Hastings' assertion that he is innocent. It plainly demonstrates that the judge was a knowing participant with William Borders in the bribery scheme.[135]

Judge Hastings attempts to explain away the incriminating contacts by giving after-the-fact explanations that are wholly unpersuasive and at times implausible. For example, he testified before the Impeachment Trial Committee that every time he spoke to William Borders in 1981, they discussed Hemphill Pride.[136] Yet, not once between February and October, 1981, when all the telephone calls occur, did Judge Hastings or Borders take any concerted action to help their friend Pride. According to the judge, in many of the calls, Borders was pestering him to write letters in Pride's support.[137] Yet, not until October 5 -- eight months after the calls began -- are the letters allegedly written and even then the judge fails to send them out. In short, Judge Hastings' own actions belie his feeble explanation that Hemphill Pride was the reason he and Borders were repeatedly in contact.

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[135] Because of the enormous number of contacts between Judge Hastings and William Borders in September and October, 1981 (at the very time the bribery deal was actually under way), the House was unable to include on the Master Chronology all of the relevant contacts and events. For a complete listing of the September and October entries, the House refers each Senator to HXs. 1b and c, attached hereto as Attachments B and C, which are charts devoted to those crucial months.

Although the Master Chronology is not a part of the Impeachment Trial Committee record, the Committee ruled that the House may use this document in its post trial brief. 1799.

[136] 2236, 2384.

[137] 2236.

Knowing that this explanation does not wash, the judge goes on to provide other reasons why he and Borders were so closely allied. He emphasizes that they were both members of the National Bar Association and, therefore, had spoken about upcoming events. But the problem with this explanation is that, as explained by one of Judge Hastings' own witnesses, Judge Henry Latimer, the section of the NBA to which Judge Hastings belonged (the Judicial Council) is an autonomous section of the organization, responsible for putting on its own programs and social functions. As President of the NBA, William Borders would not have regular interaction with the judges who are active in the Judicial Council.[138]

Moreover, even if Judge Hastings and Borders were in contact about NBA events, those events fall far short of explaining away all their contacts. The judge only offers three NBA events -- in February, May and July, 1981 -- which fail to explain all the other significant telephone calls throughout the rest of the year (especially those in September and October). Moreover, in contrast to the Romano events, the dates of the NBA events do not closely correspond to the calls made in those early months.[139] In addition, Judge Hastings gives no explanation with respect to why his messages for Borders would be "urgent", if only a NBA matter was on his mind.[140]

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[138] 1714-15.

[139] Moreover, the judge fails to provide any documentary evidence in support of his self-serving claim that there was a May NBA meeting attended by Borders.

The same is true with respect to Judge Hastings' other explanations. He uses a court case that Borders filed against President Reagan to explain their contacts, especially the three phone calls immediately before and after the Romanos' sentencing on July 8. Specifically, he alleges that Borders won his case on July 7, which is why they were in telephone contact on July 5 (at 8:58 p.m.) and July 7 (at 11:56 a.m.). Again, however, Judge Hastings' explanation is far from compelling. Nowhere in the record is there any evidence that either the judge or Borders knew that the Court would rule in Borders' case on July 7. Thus, Judge Hastings' explanation does not even address the two calls he made to Borders before July 8. Rather, it is clear that the purpose of these calls had to do with a strategy to induce the Romanos to accept the offer of a deal.

The pattern of contacts between Judge Hastings and William Borders must be viewed in context. The two men had few other contacts besides those that correlate with the key events in the Romano case and the bribery conspiracy. These men would meet or telephone one another only for a specific purpose. The House submits that this purpose was to plot the selling of Judge Hastings' power over criminal defendants.

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[140] For example, with respect to the "urgent" message Judge Hastings left for Borders on May 4, 1981, the very day he issued the initial order forfeiting over a $1 million of Romano property, the judge introduced evidence that on April 21 he sent Borders a letter making a recommendation for the NBA annual meeting to be held in July. He gives no explanation as to why it was so urgent for him to speak to Borders about his proposal so far in advance. Nor does the date of his proposal correspond with the telephone contact.

As detailed in the Statement of Facts and Master Chronology, the indisputable pattern of contacts between Judge Hastings and William Borders raises a significant inference that the judge conspired with Borders to obtain a bribe. The contacts set the stage for the analysis of all the other incriminating evidence. When added to Judge Hastings' own incriminating conduct, the pattern of contacts leaves little doubt that Judge Hastings is guilty as charged.

2. Three Separate Times Borders Offered Proof of Judge Hastings' Involvement. Three Separate Times Judge Hastings Complied.

In reviewing the evidence of Judge Hastings' complicity in the bribery scheme, it is also helpful to carefully consider the promises that William Borders made as proof that the judge was an active participant. Borders made three separate "offers of proof" for the purpose of persuading the Romanos that he could control Judge Hastings. In each instance Judge Hastings took the promised action. Each offer of proof involved actions that only the judge could take. In each case the promised conduct was not the subject of public knowledge. And, in each case the only reasonable explanation of Borders' ability to accurately predict the judge's conduct is that Judge Hastings was actively participating in the conspiracy. Moreover, Judge Hastings' attempts to explain away his incriminating conduct consistent with the offers of proof are incredible.

a. The May 11 Continuance.

The first offer of proof that Judge Hastings was in on the deal was made by William Borders to William Dredge in May of 1981. At that point Borders had been talking to Dredge for over a month about the Romano case. Dredge had been stringing Borders along with various excuses -- telling him that the Romanos were not interested, or they did not have the money, or they had some other contact with the judge. Borders was infuriated by suggestions that someone else could control Judge Hastings. Finally, on the morning of May 10, 1981, Borders told Dredge that the judge was going to give the Romanos one last chance to take advantage of the bribery deal. Borders promised that Judge Hastings would continue the sentencing scheduled for the next day. And, in fact, the sentencing was continued.

Judge Hastings does not deny that Borders may have told Dredge that a sentencing in the Romano case would be continued. But he belittles the significance of this continuance on three grounds: 1) Dredge was wrong about the date and was, in fact, referring to the July 8 hearing, which, of course, was not continued; 2) the crux of the proof was that the judge would grant this continuance sua sponte when, in fact, the continuance was granted at the request of defense counsel; and 3) the judge could not have passed this information to Borders because he had not known in advance that the Romanos would request a continuance.

On the first point Judge Hastings argues that Dredge did not meet Borders until early May and, therefore, Dredge must have been referring to the July sentencing. The evidence, however, establishes that Dredge met Borders *early* in the spring of 1981. Dredge has testified to that effect. In Borders' appointment book Dredge's number is found in the space for the week of March 30.[141] And the contacts with the Romanos, which Dredge says he made through Phillip "Brother" Moscato, are corroborated by the testimony of Neal Sonnett that in the second week of April the Romanos reported to him that through Moscato they learned that a Washington attorney could help them with their case.[142] Further, Dredge had good reason to remember the date on which he spoke to Borders about the sentencing. May 10, 1981, was the day that he was arrested on the pending Baltimore drug charges.

On the second point, although it may have been important to Dredge that the judge was going to grant a continuance on his own motion, that point is of no moment in assessing the significance of Borders' promise that the sentencing would be continued. The important fact is that Borders had *any* information at all about the postponement of the Romanos' sentencing. There had been no formal request for a continuance; there was no filing of a written motion for a continuance as required by the rules; the fact that a continuance was being considered was not public information. The persons other than the judge who would have reason to know about a possible postponement -- Neal Sonnett, members of his firm and staff, and the judge's staff -- have all testified that they did not provide any information to William Borders concerning that matter. And the judge has suggested no reason why those persons should not be believed.

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[141] HX. 67.

[142] Indeed, Sonnett's memorandum about the calls he received from the Romanos in this regard is dated April 16, 1981. *See* HX. 25.

Further, Neal Sonnett may have orally notified chambers of his desire for a continuance by the close of business on May 8, 1981, which in turn would have given Judge Hastings notice in time to inform Borders. The testimony on this point is inconclusive. But whether Neal Sonnett had conveyed his plans to the court is not determinative. For Judge Hastings might well have planned to grant a continuance *sua sponte*, the need for which was obviated by the defense request at the time of the sentencing. In either case, the important fact is that Judge Hastings decided in advance of the hearing that there would be a postponement of the sentencing and he shared that information with William Borders.

Finally Judge Hastings' conduct at the beginning of the May 11 hearing confirms his intention to continue the Romanos' sentencing as part of the bribery conspiracy. Logic would dictate that the outstanding motions -- including a motion for a new trial and a motion for judgement of acquittal -- would be argued and decided first, for if either of them were granted, there would be no sentencing. Judge Hastings, however, took the bench and proceeded immediately to sentencing, asking counsel to step forward and present their arguments of mitigation or aggravation on behalf of either or both of the Romanos.[143] This conduct by Judge Hastings is the exact opposite of what one would expect if the hearing were in fact to go forward. In short, Borders told Dredge that Judge Hastings would postpone sentencing in order to give the Romanos a message. Judge Hastings acted as promised.

b. The September 16 "show" at the Fontainebleau.

The next two offers of proof that Judge Hastings was an active player in the bribery scheme were made when William Borders met H. Paul Rico for the first time at the Miami International Airport on September 12, 1981. When discussing the terms of the bribery deal, Borders proposed that the issuance of an order returning some of the previously forfeited property of the Romanos would serve as proof that the judge was "on board". This proof would be provided after an upfront payment on the bribe. Then Borders and Rico agreed that before any money was paid, Borders would provide proof of his control of Judge Hastings by having him appear on a certain date at a time and place to be named by Rico. As with the May continuance, the promises made by Borders were of actions which only the judge could take and concerned conduct which was not the subject of public knowledge. Again, Judge Hastings performed as promised, proving his involvement in the bribery conspiracy.

With respect to the "show" by Judge Hastings, Rico was the one who suggested that Borders have the judge appear at a given place and time. Rico asked Borders if he needed to get back to him to let him know when the judge would be available. But Borders did not need to check with the judge. Borders said they could set it up right then and he immediately chose the following Wednesday, September 16 -- the day of the championship fight. Rico then chose the main dining room of the Fontainebleau Hotel at 8:00 p.m.

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[143] HX. 4.

William Borders was able instantaneously to select a date for Judge Hastings' appearance at the Fontainebleau Hotel because he and the judge had previously discussed the possibility of providing such proof. Indeed, given Judge Hastings' heavy travel schedule, it would have been foolhardy for Borders to make such a promise without knowing the judge's availability. Borders knew the extent of the judge's travel. He even commented in a later recorded conversation when Judge Hastings called from Albany, Georgia, "Goddamn, you move around, man."[144] Borders picked September 16 for the night of the "show" because he had already cleared the date with Judge Hastings.[145]

The House submits that Judge Hastings met with Borders to discuss this and other aspects of the bribery scheme at National Airport the night before Borders first met with Rico. Judge Hastings denies any such meeting, but the facts supporting such a conclusion are overwhelming: 1) the original juxtaposition of their travel plans so that there was an hour and a half overlap between the time Judge Hastings was to arrive and the time William Borders was to leave; 2) the judge's two calls to William Borders to advise him of the delay of the flight; 3) William Borders' decision to take a 9:30 p.m. flight instead of the 7:30 p.m. flight on which he had reservations, providing once again an hour and a half overlap between the time Judge Hastings was to arrive at National and William Borders' departure; and 4) the over two hour delay between the time the judge arrived at National and his check-in at the Sheraton Hotel.

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[144] HXs. 61a-b.

[145] Judge Hastings' explanation that Borders might have based his promise to Rico on the fact that Judge Hastings had already agreed to meet Borders for dinner on September 16 makes no sense. According to Judge Hastings' own testimony, Borders did not ask him to dinner until after Borders' September 12 meeting with Rico. 2246.

Judge Hastings testified that he advised Borders of his delay because Borders was supposed to pick him up at the airport. But this claim does not make sense. Why would Borders agree to pick up Judge Hastings at 6:00 p.m. and drive him to his hotel, when Borders was himself scheduled to leave from National less than an hour and a half later? And certainly, upon learning from Judge Hastings at 3:30 p.m. that the flight had been delayed, reducing even more the time between the judge's arrival and Borders' 7:30 p.m. departure, Borders would have told the judge that because of the delay he would not be able to pick him up.[146] If the only reason for their meeting that night had been the providing of a ride from the airport, there would have been no need for the judge to have made a second call to Borders advising him of the estimated departure time of the judge's flight. The purpose of their meeting on the night of September 11 went beyond mere courtesies.

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[146] It is presumed that Judge Hastings and William Borders actually spoke at the time of the 3:27 p.m. call since no message was left at Borders' office at that time.

It was essential that Judge Hastings keep William Borders posted on his estimated arrival time so that Borders could do whatever was necessary to ensure that the two of them would have an opportunity to discuss in person what would happen the next day when William Borders met "Frank Romano." The House submits that is exactly what happened. Upon learning of the further delay, Borders decided to take a later flight to Miami. He then met Judge Hastings at National at approximately 8:00 p.m., and the two of them discussed the bribery scheme and the offers of proof which William Borders would make the next day to convince H. Paul Rico that he really did speak for Judge Hastings.[147] Sometime before 9:30 p.m. Borders boarded his flight to Miami via Atlanta. At approximately the same time, Judge Hastings left the airport to pick up his date for the evening and proceeded to the Sheraton Hotel.

The judge's alternative explanation of the delay from the time of his arrival until the time of his check-in is unpersuasive. Judge Hastings attributes the two and one quarter hours delay to two events -- an unusually long wait for his baggage and a cab driver who got lost. The judge says that during the wait at the airport he talked and joked with several prominent attorneys from Miami. At least by the time of Borders' trial in March 1982, Judge Hastings knew that his activities between the time of his arrival at 8:00 p.m. and Borders' departure at 9:25 p.m. on September 11 would be critical. And yet none of these attorneys were called as witnesses before the Impeachment Trial Committee nor were they called at the judge's criminal trial.[148] The delayed luggage, the lost cab driver, the tardy companion are simply convenient falsehoods manufactured for the occasion.

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[147] Given that Dredge had previously said the Romanos had already been taken for $50,000, Borders knew he would have to prove Judge Hastings was really in on the deal.

Having met with Judge Hastings to discuss the bribery deal William Borders was able to promise Rico the next morning that Judge Hastings would show on September 16 at 8 p.m. at the Fontainebleau Hotel to prove his involvement in the bribery scheme.

Having set up the deal, Borders now needed to report the details of his meeting with H. Paul Rico that morning -- he needed to tell the judge what acts Rico had, in fact, demanded as a show of proof. Judge Hastings and Borders had developed offers of proof, but they did not know whether Rico would accept them or make other demands that they had not anticipated. So they planned a second meeting. Like the meeting at National, the meeting between Judge Hastings and William Borders on the night of September 12 at the Sheraton Hotel was not happenstance -- it was planned in advance.

There were five people in Judge Hastings' Sheraton Hotel room on the night of September 12 -- Margaret and Pearl Dabreau, Jesse McCrary, Donna Mendez Myrill and Judge Hastings. With the sole exception of Judge Hastings, they all remember that they were sitting around that evening and were waiting for something. Ms. Myrill specifically remembers that they were waiting for William Borders, who she knew.

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[148] Similarly the judge offered no corroboration of his testimony that the cab driver was lost in Northwest Washington, near Walter Reed Hospital, for some inordinate period of time. Shirley Ross, the judge's date for that evening, testified at the criminal trial, but she was asked no questions about whether the judge called that night for directions to her home, or said anything after he finally arrived about having been lost.

Certainly all of the circumstances of the events that evening support Ms. Myrill's testimony and the conclusion that Judge Hastings and William Borders had planned to meet. First, despite Judge Hastings' testimony to the contrary, others in the room testified that the judge was not surprised when William Borders appeared at his door at 10:00 p.m. Second, the group had gathered for the purpose of having dinner, and yet at 10:00 p.m. there had been no move to go to dinner. The group went to the dining room almost immediately after William Borders arrived. Third, William Borders cut short his stay at a long planned family reunion in Fort Pierce, Florida and made almost Herculean efforts to return to Washington on that evening. The only apparent reason for his return to Washington was to join Judge Hastings and the group at the Sheraton. Moreover, it is incredible that he would have gone to so much trouble without knowing that he would actually find Judge Hastings at his hotel on a Saturday night. William Borders returned to Washington, D.C., knowing he would find Judge Hastings, who was waiting to hear the outcome of the meeting with "Frank" Romano.

The evidence establishes that Borders made an offer of proof, immediately selected a date without needing to consult Judge Hastings, allowed Rico to pick a time and place for the show and then returned to Washington to inform Judge Hastings. All that was left, was for Judge Hastings to appear as promised. He did so. On September 16, 1981, a little before 8:00 p.m., Judge Hastings arrived at the Fontainebleau Hotel.

Over the next two hours Judge Hastings had dinner in the main dining room with a friend, Essie Thompson. The Fontainebleau was not a place where the judge dined regularly for, according to Ms. Thompson, he had some difficulty finding the dining room and he did not appear to know his way around the hotel. At one point, not too long after they were seated, Judge Hastings left the main dining room and looked into the Poodle Lounge, making sure that he was seen. Nothing in his conduct that night or the events leading up to the dinner corroborates Judge Hastings' contention that he went to the Fontainebleau because William Borders had asked him to meet him there. Indeed, many of his actions were totally inconsistent with that premise.

Not once did he mention William Borders in connection with that dinner. Essie Thompson, a social acquaintance whose friendship with the judge continues, testified before the Impeachment Trial Committee that Judge Hastings called her twice with regard to the dinner -- once to invite her to join him and a second time to confirm the time he would pick her up. According to Ms. Thompson, at no time during those telephone calls, nor during the 20 to 25 minute drive to the Fontainebleau, nor during the dinner itself, did Judge Hastings mention the name of William

Borders or suggest that anyone might join them for dinner. Judge Hastings does not deny those facts.

Judge Hastings says that he told the hostess or the maitre d' that he was expecting someone to join them. Essie Thompson did not hear such a statement. And apparently the maitre d' did not hear it either, for they were seated at a table for four and the extra places were promptly removed. Judge Hastings, who had made reservations for two, did not object. Nor did Judge Hastings make any effort to find his friend -- he did not page Borders, or stop at the main desk to see if Borders had checked in, or look into the other restaurants at the hotel.

Finally, if Judge Hastings was not part of the deal as he argues, Borders would never have risked asking Judge Hastings to come to the Fontainebleau for the purpose of meeting him there, when Borders was to attend a championship fight in Las Vegas on the very same night. Borders had been planning this trip since the middle of August and his plans were not a secret. Borders would have been taking a significant chance that Judge Hastings might call his office -- for example, to find out when Borders would be arriving in the Miami area -- and learn from Cynthia Rogers that Borders was in Las Vegas. The judge would then have had no reason to go to the Fontainebleau and the deal would have been blown.

Ms. Rogers, Hemphill Pride and even H. Paul Rico knew William Borders was going to the championship fight and would not be in Miami on September 16, 1981. So too did Judge Hastings. He went to the Fontainebleau as part of the bribery deal. The second offer of proof of Judge Hastings' involvement was delivered.

c. The October 6 Romano forfeiture order.

The third offer of proof involves the Romano forfeiture order. At the September 12 meeting with Rico, Borders promised that within ten days of a payment on the bribe Judge Hastings would issue an order returning to the Romanos a substantial part of their property which had previously been forfeited.[149] That order would be a second signal that the judge was on board, and the Romanos could then safely withdraw their appeals in order to pursue the reduction of their sentences. As with the first two offers of proof, Judge Hastings performed as promised. The terms of the offer, Judge Hastings' conduct with respect to the forfeiture order, the coincidence of the issuance of the order with other events in the conspiracy -- all lead to the conclusion that Judge Hastings was actively conspiring with William Borders to sell his office for personal gain.

This offer of proof illustrates William Borders' detailed knowledge about the nature of the forfeiture matter pending before Judge Hastings. Borders knew, first of all, that a large amount of the Romanos' property had been forfeited. He promised that part, rather than all, of that property would be returned. He predicted that the portion returned would be substantial. Finally, Borders knew that the order would be issued shortly. These are very sophisticated pieces of inside information available only to someone familiar with the Martino case and its impact in the Romano case.

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[149] Judge Hastings has argued that the order was originally supposed to issue within ten days of the September 12 meeting. His argument is based in large part on Rico's comment at the September 19 meeting that that was his understanding. Rico, however, was mistaken. For Borders was clear throughout the September 12 conversation that the ten days would begin to run after some money was paid. See HXs. 38a-b, at pages 3 and 9.

The very terms of this offer indicate that Judge Hastings had provided William Borders with the information about the Romano case. First, there is no evidence that William Borders had a source other than Judge Hastings for this information. Although the court files were open to the public, in 1981 those files were kept in the individual judge's chambers and were available only by making a request of the judge's staff. Neither Borders or his representative ever made such a request. The judge does not argue otherwise.

Judge Hastings suggests that security in the courthouse was quite lax, implying that Borders might have gained access to the files without staff knowledge. He has also presented evidence that many lawyers were interested in the Romano case and might have called inquiring about it, again without staff knowledge of who was actually making the inquiry. There is no support in the record for either of these theories, beyond Judge Hastings' testimony.

In any case, these arguments are irrelevant, for the public information available from the file or from the staff would be quite limited in scope. Indeed, it would be limited to one public fact: the previous May 4 forfeiture order. A person could not learn by reviewing the file or making a casual inquiry of chambers staff whether the forfeiture was going to be reversed, the extent of such a reversal if any, or the timing of the reversal order. Such detailed information would be available to only a few people and disclosure would require a conscious decision on the part of the staff member. The staff denies having made such a disclosure and Judge Hastings does not argue that any member of the staff was responsible for the information Borders had on September 12, 1981. In short, the only explanation of how Borders gained his knowledge is his contacts with Judge Hastings.

Second, Judge Hastings' conduct with regard to the October 6 forfeiture order coincides precisely with other events in the Romano bribery scheme, providing further support for the conclusion that he conspired with Borders to obtain a bribe. Rico called William Borders on the afternoon of Friday, October 2 and informed him that he had not received the promised order reversing in large measure the May 4 forfeiture. Within a couple hours of Rico's inquiry, William Borders called Judge Hastings, but the judge had left for the day. When Rico called again on Sunday morning, Borders said that he had not been able to find out yet because he could not talk to anybody, and asked Rico to call again the next day. Who could he possible have meant other than Judge Hastings, who had left on Friday before Borders could reach him? That Sunday afternoon, Borders again tried to reach Judge Hastings, leaving a message at the judge's home. The very next morning Judge Hastings told his law clerk, Jeffrey Miller, that he wanted the Romano order done that day. That afternoon, Borders assured Rico that the order had been taken care of.

Judge Hastings does not deny this sequence of events. He does not deny that he told Miller to finish the Romano forfeiture order right when Borders was giving assurances to Rico. Nor does he deny that this was the first time he instructed Miller to prepare the order by a time certain. His explanation for this incriminating evidence is that he was anxious to have this matter finished because Miller would be leaving by the end of the month, and he did not want this complicated order left for another clerk.

The judge's actions with regard to the October 6 order, however, were inconsistent with his usual approach and were not warranted by facts independent of the bribery scheme, including his law clerk's expected departure. In the first place, it was unusual for Judge Hastings to demand that an order, especially a complicated one, be finished on the same day. Jeffrey Miller, as well as another law clerk, Lisa Goldstein, testified to that fact.[150] Secondly, his communications with staff concerning the order created a sense of urgency that it be completed and sent out as quickly as possible. Miller dropped other matters and left the office to go home and work on the Romano order. He advised the secretary in advance that he would be bringing the order in and asked her to set aside time to type it -- a precaution which he did not take with any of the other matters that he had to finish before completing his term with Judge Hastings. According to Marilyn Carter, the courtroom clerk, Judge Hastings apologized to the staff for the rush, and stated that the order had to get out that day. Indeed Ms. Carter was so impressed with the urgency of the matter that she sent the order special delivery. Clearly Judge Hastings' conduct undermines his assertion that it was only the writing of the order by Miller with which he was concerned, not its receipt by the parties.

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[150] Ms. Goldstein's prior testimony was introduced at the Impeachment Trial Committee hearings. 2072.

Moreover, the explanation given by Judge Hastings -- that the timing of the issuance of the order was a product of the fact that Miller was leaving and that the judge had a busy travel schedule in October -- is unpersuasive for other reasons. Miller was not scheduled to leave for another four weeks. The judge's travel schedule had him in Miami for half of the work days in October 1981.[151] Therefore, there was ample opportunity for the judge to sign the order in early October significantly in advance of Miller's planned departure. Further, Miller was responsible for other complicated matters but they were not treated with the urgency given the Romano forfeiture order.

There are no other facts which innocently explain the manner in which the October 6 forfeiture order was issued. Nothing had happened in the Romano case in late September or early October to warrant any particular urgency in the issuance of the order. At the July 8 hearing, the judge had promised a "brief written order." No further briefs were submitted; nor was there further argument.

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[151] RXs. 97, 100.

There was no legal deadline for the submission of the order. Nonetheless, the order was issued as promised.

The circumstances of the October 6 forfeiture order, like the other two offers of proof made by Borders, supports a finding that Judge Hastings was a knowing participant in the bribery conspiracy. There is no other reasonable explanation of the facts -- the detailed information known by Borders; the coincidence of the judge's unusual demand that the order be finished immediately with the series of phone calls between Rico, Borders, and Judge Hastings; the urgency with which the order was treated by the judge's staff; and the absence of any independent explanation for that urgency. Without exception these facts point to Judge Hastings complicity in the bribery scheme.

3. More examples of Judge Hastings' complicity: the April 9 pay phone call; the October 5 coded conversation; the October 9 flight from Washington; Hastings and Borders' Relationship.

In addition to the actions by Judge Hastings in conformance with the promises William Borders had made first to William Dredge, and then to H. Paul Rico, there is other conduct by Judge Hastings that can only be explained by his participation in the bribery conspiracy. Three events in particular stand out: 1) the April 9 pay phone to pay phone call charged to Judge Hastings' residence telephone; 2) the coded conversation between Judge Hastings and William Borders on October 5; and 3) the circumstances surrounding Judge Hastings' hurried departure from Washington, D.C. on October

9, 1981. In addition, Judge Hastings' and Borders' relationship undermines his assertion of innocence.

a. April 9, 1981.

The House submits that on April 9, 1981, Judge Hastings made a pay telephone call to William Borders as part of the bribery conspiracy. The call was from made from a pay phone in the Miami Federal courthouse to a pay phone in the District of Columbia Federal courthouse. It occurred near the time of significant events in the Romano bribery scheme. And, it has no innocent explanation. The circumstances of the call are as follows.

William Borders met William Dredge in March of 1981. By early April, Borders had learned from Dredge that the Romanos were "stand up" people and had asked him to convey to the Romanos that he could help them with their pending case. Sometime during the week of April 7, the Romanos were contacted and told that there was a Washington attorney who could help them. And, on April 8, the pleadings on the forfeiture issue were submitted. The very next day, on April 9, Judge Hastings called William Borders. He left a message that Borders should call between twelve and one that afternoon. At 12:15 p.m., a call was made from the pay phone just down the hall from Judge Hastings' chambers to a pay phone in the Federal courthouse in Washington, D.C. and charged to the judge's home number.

Judge Hastings does not deny that he made the call, although he claims to have no recollection of it and therefore cannot explain why he would leave his office to make a call to Washington, D.C. The judge testified that the court's phone system was sometimes down, though he did not think it was down on that day.[152] And, in fact, other long distance calls were placed from chambers on that day. He initially suggested that the call may have been made on the spur of the moment because he realized after leaving his chambers that he had a call to make and did not want to return to the office for the sole purpose of making a call. But on further questioning he admitted that, unlike a call from a pay phone to a residence or office, a call from one pay phone to another pay phone would have to be prearranged and could not have been made on impulse.[153]

Judge Hastings admits that the call may have been placed in response to a request by William Borders that the judge go out to a pay phone and call him back. The judge, however, cannot explain why he would consent to such a request and act in such a bizarre manner.[154] The judge testified to concerns that the courthouse phones might be tapped. But those suspicions had not arisen in April of 1981.[155] Moreover, what topic could he have been discussing which would require such secrecy, except for the bribery scheme? He testified that there were various events occurring in the NBA in early April, 1981, which would require him to talk to

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[152] 2222, 2343.

[153] 2343.

[154] 2221-22; 2342-43.

[155] 2246.

William Borders.[156] But none of those matters would have been so sensitive as to require such clandestine conduct. In short, there is no exculpatory explanation for this pay phone to pay phone call between Judge Hastings and William Borders which corresponds precisely to early key events in the Romano case. Borders and Judge Hastings were following the same pattern Borders and Dredge used to discuss clandestine matters -- go out to a pay phone and call me at a pay phone.

b. October 5, 1981.

The second instance of incriminating conduct by Judge Hastings also involves communication with William Borders by telephone -- the coded telephone conversation of October 5. The significance of this evidence cannot be overemphasized. Judge Hastings argues that this conversation was not coded, nor was it complicated.[157] It was a simple, short conversation about the drafting of letters soliciting financial contributions and support for the reinstatement efforts of their mutual friend, Hemphill Pride. According to Judge Hastings, he was calling William Borders to get information on Pride's financial status so that he could complete the draft letters.[158] The evidence, however, is overwhelming that Judge Hastings' explanation is untrue. The conversation is not about "letters for Hemp." Rather it is about the bribery scheme.

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[156] 2226.

[157] 2382.

[158] 2257-58.

First, one must consider the testimony of Dr. Roger Shuy, Chairman of the Department of Linguistics at Georgetown University and an acknowledged expert in linguistics and conversation analysis. Dr. Shuy reviewed the October 5 conversation, the October 8 conversation between William Borders and Judge Hastings, the portion of the judge's criminal trial testimony that addresses the meaning of the October 5 conversation and ten recorded conversations between William Borders and other persons. Applying standard analytical linguistic procedures, Dr. Shuy carefully examined the October 5 conversation and concluded that it is in code.[159]

Dr. Shuy found three characteristics associated with coded conversations in the October 5 conversation: 1) the use of pause fillers, repeated words, and false starts around topic words in the conversation; 2) numerous logical inconsistencies; and 3) repeated confirmations of understanding. The first characteristic indicates the care both Judge Hastings and Borders were taking when choosing their words. The second characteristic illustrates that on its face the October 5 conversation does not make sense. And, the third characteristic -- repeated confirmations -- reveals the continuing need by each party to assure the other that he is being understood, even though they were allegedly talking about very simple information. The clustering of these three characteristics in this brief conversation indicates that the conversation is in code. In comparison the conversation between Judge Hastings and

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[159] 536.

William Borders just three days later, has virtually no linguistic indicators of code even though the conversation is twice as long.[160]

Perhaps most important to the lay person are the logical inconsistencies. Dr. Shuy points out that the October 5 conversation is illogical not only in its ideas, but also in the syntax used to express those ideas. As an example, during his testimony, Dr. Shuy analyzed the following portion of the conversation:

> **WAB:** See, I had, I talked to him and he, he wrote some things down for me.
>
> **ALH:** I understand.
>
> **WAB:** And then I was supposed to go back and get some more things.

When William Borders says "he wrote some things down for me," at face value that phrase would mean Hemp had written down some thoughts or ideas. The word "things" would be used to mean "ideas." In the very next sentence, however, Borders uses the word "things" in a manner which normally conveys an entirely different meaning. For when Borders speaks of "get[ting] some more things," the word "things" seems to represent tangible objects, not something intangible such as ideas or information. In the English anguage, although one might say "I'm going to the library to get some ideas," one would not attempt to convey the same thought by saying "I'm going to the library to get some things." This unexplained shift in what is represented by the word "things" is an example of illogical syntactic construction. The break-down in common rules of English syntax is an indication that the parties are speaking in a rough code and the conversation cannot be accepted at face value.

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[160] In the October 5 conversation there are nine different instances where Judge Hastings or William borders use pause fillers, repeated words or false starts around the topic words in the conversation. The October 8 conversation has only one false start and one repeated word. The October 5 conversation is replete with logical inconsistencies; the October 8 conversation has none. Judge Hastings confirms his understanding of Borders' meaning four times in the October 5 conversation. In contrast, the October 8 conversation which is conveying such information as flight numbers and arrival time, has only two confirmations of understanding. 539, 542.

Likewise, a common sense analysis by non-experts leads to the very same conclusion -- the conversation makes no sense on its face. Judge Hastings made this call for the purpose of getting information. According to the judge, the information he needed was an update on the financial status of Hemphill Pride. However the flow of the conversation belies this explanation. Judge Hastings' initial question to Borders is whether Borders heard from "him" since they had talked. When Borders gives a curt, almost non-responsive answer -- "yea" -- Judge Hastings does not ask a follow-up question such as "What did he say" or "What did you find out." Instead the judge acts as if Borders has given him a complete response. "Oh. Okay," says Judge Hastings, "Alright, then." The conversation continues with the nonsensical reports by Borders about someone writing some things down and going back to get more things, described above. Judge Hastings repeatedly assures Borders that he understands what Borders is saying even though Borders' statements are illogical. And then Judge Hastings says there is "no great big problem" and he will send the stuff off to Columbia the next morning. He has not obtained the information concerning Pride's financial status which he needed in order to complete the letters, yet he concludes that there is no problem and he can send the letters to Columbia.

Judge Hastings suggests that the reason he did not follow up and get the specific information for which he had called was that he was already beginning to waver in his decision to write the letters on behalf of Pride. There is nothing, however, in either the content or the tone of the conversation to suggest the slightest hesitation on the part of Judge Hastings.

Moreover, the conversation is unusual in several other respects. It does not have any of the congenial, social "patter" that one would expect from Judge Hastings. According to the judge, he had not spoken with William Borders for approximately two weeks. Yet the greeting is cursory at best -- not even a "How you doing." Similarly, at the conclusion of the conversation there is simply a quick "good-bye." There is no mention of the upcoming gala celebration in Washington, D.C. There is no discussion of the case over which the judge is presiding and whether he will be able to finish the trial in time to attend that celebration, which is in Borders' honor. If the judge is to be believed, they have not spoken in two weeks, it is only four days until the judge is supposed to come to Washington and yet there is no mention of the judge's plans -- not even a "See you on Friday." Comparison of this conversation with any other recorded conversation of Judge Hastings, or even with his testimony before the Impeachment Trial

Committee, reveals that the October 5 conversation was not in keeping with the judge's gregarious style.

Finally, if the conversation were about "letters for Hemp," one would expect corroborating facts independent of the conversation itself. Except for the existence of the purported draft letters, HX. 154, there are none.[161] Indeed, all of the extrinsic evidence is contrary to the purported content of the conversation.

For example, according to Judge Hastings, he was referring to Hemphill Pride when he asked Borders if Borders had spoken to "him" since the judge and Borders had talked. According to Judge Hastings, that would mean after September 20 or 21. Borders responds that he had. But there is no documentary or testimonial evidence to support that statement. And, except for a vague recollection of Judge Hastings, there is no evidence that Borders had spoken with Pride after September 21 in a context where Pride would be able to write anything down for Borders.[162] Further, Pride testified unequivocally that he did not write anything down for Borders at any time in the fall of 1981. Nor was he supposed to provide supplemental "things" for Borders.

Nor are there independent facts to corroborate Judge Hastings' statement that he would send the letters out the next morning. Not only did Judge Hastings not send the letters out to Columbia the next day as promised, he did not even follow his usual practice and give them to his secretary to type. The judge's explanation for not sending the letters is that he decided overnight that such conduct would violate the judicial canons of ethics. But he did not advise Borders of that decision. According to Judge Hastings, Borders had hounded him about preparing these letters for months. Yet, having led Borders to believe that they would go out the next day, the judge did not even call Borders to tell him of his change of heart. Nor did he mention it in his conversation with Borders three days later on October 8. Nor, when he spent the better part of the morning with Borders on October 9. Judge Hastings states that he was waiting to talk with Borders and Pride together. However, as Judge Hastings admits, Pride knew nothing about the solicitation of letters or funds in his behalf. Pride had not been involved in the lengthy give and take between Borders and Judge Hastings about the writing of these letters.[163] Therefore there was no reason to postpone talking to Borders about his decision until a time when Pride would also be available. In short, the judge's explanation of his conduct is incredible.

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[161] The draft letters are discussed in detail below in the discussion of Articles VIII and IX.

[162] Pride saw William Borders in September of 1981, but that was when he came through Washington before Borders went to Las Vegas for the fight.

The evidence that the October 5 conversation is in code is insurmountable. The conversation does not withstand expert linguistic or common sense analysis. The conversation, which is initiated by Judge Hastings, is inconsistent with the admittedly gregarious nature of the judge. There are no facts corroborating the events described in the conversation and the subsequent conduct by Judge Hastings undermines his false explanations. What then, is the actual meaning of the conversation? The House submits that Judge Hastings' true purpose in calling William Borders on the afternoon of October 5 was to confirm that the deal was still on in spite of the fact that the forfeiture order had not been issued within the time frame promised by Borders.

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[163] Indeed, if he had, Pride would have informed Judge Hastings that such letters were inappropriate. They would not have been timely since Pride was not eligible for reinstatement for almost two years, and, in Pride's view, they might have been harmful, since he considered his reinstatement to the bar to be a strictly local matter.

One must first place the October 5 conversation in the context of other events in the bribery conspiracy. The House submits that during the afternoon or evening of Sunday, October 4, Borders finally reached Judge Hastings after leaving a message at his home. At that time Borders must have told the judge that Rico was putting pressure on him about the order which was supposed to have been issued the week before. Judge Hastings must have assured Borders that he would take care of it right away, for, on the next morning, Judge Hastings instructed his law clerk to do the Romano order that day. Based on those assurances, Borders told Rico on Monday afternoon that the order had not gone out earlier as Borders had thought, but it had been taken care of and would go out that day or the next morning. Forty minutes after Borders' conversation with Rico, Judge Hastings placed the call which resulted in the coded conversation.

Judge Hastings clearly initiated this call for the purpose of obtaining specific information, not just to chat. When he asks whether Borders has "heard from him" since they talked, the judge is asking whether Borders had heard from "Frank" Romano. Having just spoken with the person he believes to be Romano, Borders responds that he has and does not elaborate. When the judge, by failing to make any substantive comment, appears to hesitate, Borders continues the conversation, using the code to relate what he had learned when he spoke with Rico. He describes the two part payment plan -- "he wrote some things down for me . . . and then I was supposed to go back and get some more things" -- thereby confirming that second part of scheme is still in place and Rico has not called off the deal. At this point, Judge Hastings does make a substantive response. He acts as if he has obtained the information he was seeking and states that he will send the stuff off to Columbia the next morning.

Judge Hastings has learned no new information about Pride's financial situation, but he *has* learned what he needed to know before signing the order returning over three quarters of a million dollars worth of property to the Romano brothers. As a result of the October 5 conversation, Judge Hastings issued the *Romano* forfeiture order the next evening. And two days later, when Rico inquires again about the order, Borders says it has gone out, it "went out yesterday morning" -- his specific information about the timing of the order coinciding exactly with Judge Hastings' promise on October 5 that he would send the "stuff" out in the morning.

The October 5 conversation, which makes no sense if accepted on its face, is satisfactorily explained only in reference to the Romano bribery scheme. The actions of the parties are consistent with the latter interpretation of the conversation, and independent facts corroborate that Judge Hastings was not calling William Borders about letters for Hemp, but instead to confirm that their scheme to obtain $150,000 bribe from the Romano brothers was still intact.

c. October 9, 1981.

The third compelling indication of Judge Hastings' guilt is the circumstances surrounding his departure from Washington, D.C. on October 9, 1981. This conduct, too, persuasively indicates that he was a knowing participant in the bribery scheme. Within an hour of learning of William Borders' arrest, Judge Hastings was in a cab on his way to the Baltimore Washington International Airport, in hopes of avoiding the FBI until he had returned to Miami. This conduct, even when measured against the standard of a Black Federal judge raised in the South in the 1940's and 50's, is further evidence of Judge Hastings' guilt.

Shortly after 2:45 p.m. on October 9, 1981, Judge Hastings learned that William Borders had been arrested and that agents of the FBI wanted to interview him. Judge Hastings did not call the FBI as they had requested. Instead he packed his bags and fled the hotel. He did not check out, he did not pay his room service charges, he did not pick up the suit which he had left with the valet service. Although he had no airline reservations for that afternoon, he did not call and attempt to make reservations. Instead he simply got into a cab and asked to be taken to BWI.

Judge Hastings has offered a series of explanations for various aspects of this behavior: he did not check out because he thought he was not responsible for the room charge -- that perhaps it was complimentary. He gave Pride $100 to cover the room service and valet charges. He went to BWI because he thought all of the planes from National went through Atlanta.

Once again, none of the judge's explanations are corroborated by the evidence. The L'Enfant Plaza did not provide the room free of charge and someone other than Judge Hastings paid for it. Hemphill Pride denies that Judge Hastings gave him money or said anything about paying the judge's incidental expenses as he rushed from the hotel. Those charges were never paid and the suit was eventually recovered by the FBI. There was a non-stop flight from National Airport to Miami at 4:35 p.m. that afternoon -- a flight which Judge Hastings had taken just two months earlier when it left at 5:30 p.m.

The crux of Judge Hastings' explanation of his flight, however, is that he was concerned for his mother's welfare. He testified at his criminal trial that he called his mother from the L'Enfant Plaza and found that she was hysterical because of the onslaught of the media. He was rushing to get home in order to care for her. Although his testimony before the Impeachment Trial

Committee is less clear, it appears that he continues to rely on this explanation.[164] The facts, however, contradict this account.

In the first place, there is no documentary evidence that Judge Hastings called his mother that afternoon from the L'Enfant Plaza. Neither the hotel records nor Judge Hastings' residence telephone records reflect such a call. Indeed, the hotel records indicate that no call to Florida was made from any of the hotel rooms on the afternoon of October 9. The first documented conversation between Judge Hastings and his mother was at 4:37 p.m. from BWI. Hemphill Pride's testimony supports these records, for he stated that he was with Judge Hastings from the time the judge learned of Borders' arrest until Pride left the judge with his bags in the lobby of the hotel. No calls were made by the judge during that period according to Pride.

Second, Judge Hastings' conduct does not reflect an eagerness to get home to Florida so much as an eagerness to get away from the L'Enfant Plaza, the place where the FBI might come looking for him. One would expect that the first act of an experienced traveler who learned that he had to leave Washington, D.C. unexpectedly on a Friday afternoon would be to call the airlines to determine the next available flight. After all, the city is serviced by three airports with varying degrees of accessibility, especially in Friday afternoon traffic. In addition, Friday afternoon is a busy travel time, when one might expect to find flights booked. But Judge Hastings did not take the time to make such a call. Instead he rushed from the hotel, got into a taxi, asked how far it was to the Baltimore airport, and upon learning that it was a $50 cab ride, obviously a good deal farther away than National, instructed the driver to take him to BWI.

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[164] 2355-56.

The ride to Baltimore took the better part of an hour, and Judge Hastings arrived at the airport around 4:30 p.m. The first thing he did, however, was not to make arrangements for his flight home. Instead he called his mother. (The House submits that this was the first time he called his mother that day.) At 5:06 p.m. he began a series of calls to Patricia Williams, taking extreme measures to make sure that his conversation was not overheard.[165] It was only at 5:31 p.m., at the conclusion of the last conversation in this series, that Judge Hastings made reservations for his return to Florida.

Upon arriving in Ft. Lauderdale, Judge Hastings rented a car (for his car was parked at the Miami airport) and went to the home of Patricia Williams. There, at around midnight, the FBI found Judge Hastings and conducted their interview.

The House submits that the actions of Judge Hastings on the afternoon of October 9 were not those of a man eager to get home to his mother. They were the actions of a man who was actively involved in the bribery conspiracy for which his friend had been arrested and who needed some time to think through his story. They were the actions of a man who was not ready to face the questions of the FBI.

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[165] Judge Hastings called Patricia Williams from one phone, gave her the number of a different pay phone and asked her to call back. When she called back, he instructed her to go out to a pay phone and call him again. She did so at 5:22 p.m. At that time he took her number, moved to a fourth pay phone and called her at her pay phone. The final conversation lasted four minutes. All of the previous ones had been one minute or less. Judge Hastings' explanations for this bizarre course of events have been both inconsistent and incredible.

Judge Hastings opposes this proposition, arguing that to return home is not "flight." He contends that he was not trying to avoid apprehension. And that he certainly was aware of his right not to talk to the FBI, so there would be no reason for him to flee for the purpose of avoiding the FBI. But knowing one's Fifth Amendment rights and being willing to exercise those rights are two different things. Judge Hastings was also undoubtedly aware that a Federal district judge's refusal to answer questions about a bribery scheme alleged to involve that judge would be viewed with suspicion. The option of meeting with the FBI and refusing to answer questions was not a viable one. But Judge Hastings could delay that confrontation. His flight from Washington via BWI provided what the judge desperately needed -- time to think about his story before facing the FBI.

d. The Relationship of Judge Hastings and William Borders Since the Conspiracy Accusation Belies Respondent's Innocence

According to Judge Hastings, the ordeal that began for him on October 9, 1981, and which has endured to this day, was the result of a betrayal by his friend and ally of at least a dozen years, William Borders. Through his political connections, Borders had been instrumental in having Judge Hastings appointed to the Federal bench. According to Judge Hastings, within a matter of months of his appointment, Borders exploited that position and their friendship by manipulating the judge into taking actions which convinced "Frank Romano," Santo Trafficante, and the FBI that the judge was selling his office.

If this were the case, one would expect the victim of this plot to harbor some sense of anger, if not outrage, towards his tormentor. Yet, events speak otherwise, and instead suggest a continuing conspiracy by Judge Hastings and William Borders to hide the truth.

This evidence starts at the moment Judge Hastings learned of Borders' arrest. According to his testimony, the judge realized almost immediately that the allegation of bribery "in his courtroom" might mean that Borders had implicated him.[166] Yet, Judge Hastings expressed no anger about Borders to Hemphill Pride, the bearer of this information.[167] Indeed, minutes after receiving the news, when he allegedly telephoned his mother, he was more concerned about finding out about "Bill" than taking care of himself or his "hysterical" mother.[168] Later that night, when the FBI finally found him at Ms. Williams' home, Judge Hastings still had nothing to say against William Borders.[169]

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[166] 2266. See also Judge Hastings' criminal trial testimony at HX. 156 (at 1916-19).

[167] 696.

[168] HX. 156 (at 1915).

[169] 769.

Three days later, on October 12, 1981, Judge Hastings called Borders' home. He claims now that he actually called to speak to William Borders' mother, and that he did so at the request of his own mother, to express Mrs. Hastings' condolences. Even if one ignores the circumstances which suggest that this explanation is patently absurd,[170] and that the true purpose was to insure that Borders would maintain his silence, it was odd, at best, that Judge Hastings would take the risk that Borders himself would not answer his own telephone.[171]

Judge Hastings and William Borders were charged by the grand jury with conspiring with each other. At his trial, Borders used the same defense later raised by Judge Hastings: that no conspiracy existed because there was only one participant, Borders himself.[172] In preparation for trial, Borders' attorney allegedly was shown the "letters for Hemp," and Judge Hastings now claims that he was available to testify at Borders' trial.[173] Yet despite the fact that these alleged offers would supply critical evidence in support of Borders' defense, neither was presented. Rather, the facts support the conclusion that Judge Hastings refused to testify,[174] and that the letters, if offered at all, were assumed by Borders' attorney to be fabricated.[175]

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[170] The call lasted two minutes or less, hardly a sufficient time to express condolences. There is no explanation why Mrs. Hastings did not place the call herself. Mrs. Hastings barely knew either Mrs. Borders or her son. Judge Hastings did not know Mrs. Borders, and could not even recall her first name. Moreover, if Judge Hastings had testified that his mother had made the call, he would also have to explain why she did not call from her own telephone, which was separately billed from her son's.

[171] The call was placed at 6:38 p.m., a time when William Borders was just as likely to be home to answer the telephone as his mother.

[172] U.S. v Borders, 693 F.2d 1318 (11th Cir. 1982).

[173] 2479, 2488.

Judge Hastings' inexplicably solicitous attitude towards Borders is also apparent in his post-trial dealings with him. He did not ask that Borders be called in the impeachment proceedings in the House or the Senate, citing his concern for Borders' safety.[176] Yet when Borders refused to testify in both Houses, he never raised this issue, and in the Senate, he expressly refused to adopt this position.[177] Rather, he asserted that he had paid his

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[174] As Borders' co-conspirator, Judge Hastings could not be compelled to testify.

[175] William Borders' attorney, John Shorter, was an experienced criminal defense attorney, who would understand his obligation to be objective and arms-length in his dealings with his client.

[176] Judge Hastings' counsel has asserted:

> Those familiar with Mr. Borders have informed us that, if he were to testify truthfully, it is likely that he would be murdered by criminal associates whom he had deceived during his career and with whom he still may be involved . . . Our assessment of the basis for these concerns and their probable affect on Borders's testimony will determine whether we ask the Committee to compel his testimony.

A Further Memorandum on Pre-Trial and Trial Procedures Necessary for a Trial that is Fair to Respondent (April 3, 1989) at 24-25.

[177] Indeed, as the colloquy reflects, Borders did not even seem to understand what Senator Rudman was talking about:

> **Senator Rudman:** . . . Your counsel has said and you have said in your statement that you are refusing to testify today on a variety of legal grounds: Fifth, Sixth, Eight

debt to society, and that to compel his testimony would violate various Constitutional rights.[178]

It is also appropriate to look at the behavior of William Borders from the time of his conviction, to glean his true relationship with Judge Hastings. Rather than testify under a grant of immunity, Borders is now in prison, having defied a court order compelling him to testify in the Senate. He complains that he has paid his debt to society, but if he had actually wronged his friend and colleague, why does he feel no obligation to repay his debt to him? If the truth would exonerate Judge Hastings, why did Borders assume that he was being called as a witness against Judge Hastings?[179] The House submits that William Borders, by his silence and imprisonment, has been more than generous to his partner in crime, but there is a limit to his willingness to suffer alone for

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> and Fourteenth Amendments, plus the fact that you believe you have a right of appeal . . . . That is your complete statement on why you refuse to testify?
>
> **Mr. Borders**: Yes, sir.
>
> **Senator Rudman**: No other reasons?
>
> **Mr. Borders**: Not at this time.
>
> **Senator Rudman**: Right. So, in other words, you don't feel any personal jeopardy if you were forced to testify; is that correct?
>
> **Mr. Borders**: I don't understand your question, Senator.1165.

[178] 1156-57.

[179] 1778. Borders was subpoenaed by the Senate Impeachment Trial Committee to appear as its witness. Because the House of Representatives feared that Borders' continued refusal to testify might delay the proceedings, the House neither requested nor opposed his being subpoenaed.

the consequences of their conspiracy. To lie under oath in order to exonerate Judge Hastings, and risk a perjury prosecution is more than he is willing to do. Judge Hastings apparently understands this, for he has not risked pushing Borders too far by joining in the call for his testimony.

Finally, there has been the tenor of Judge Hastings' testimony in these and other proceedings. While he has been quick to angrily denounce the FBI, the Department of Justice, the Eleventh Circuit Investigating Committee, the House of Representatives, Hemphill Pride, William Dredge, and others, it was not until pressed by Senator Specter that he voiced anything against the man who should be his nemesis:

> The Vice Chairman: . . . Judge Hastings, you have expressed yourself in a forceful way, eloquent way, sometimes passionate way, angry at the Chief Judge of the Eleventh Circuit, angry at some of the things that the FBI has done, angry at a number of situations, used the word "resent," and I can understand that. But I've never heard you say anything about a resentment against Mr. Borders. Why not?

Judge Hastings responded that he did resent Borders "highly," but as Senator Specter then noted, " [E]ven in the manner of expressing it as you just did, there isn't the passion in your voice, there isn't the outrage. . . ."[180] The House contends that the passion is not there because it is not felt.

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[180] 2401.

4. Conclusion.

The consistent pattern of contacts between Judge Hastings and William Borders at significant times in the Romano case, the judge's actions in conformance with the offers of proof made by William Borders, the suspicious conduct of the judge on April 9, October 5, and October 9, and Judge Hastings' relationship with Borders since their crime came to light overwhelmingly establish that Judge Hastings joined in a scheme to obtain a bribe as charged in Article I of the Articles of Impeachment. All of this evidence focuses on the conduct of Judge Hastings. Judge Hastings' assertion that there is no evidence against him is wishful thinking.

In conclusion, the House urges the Senate to consider one aspect of William Borders' behavior -- the solicitation of a bribe from Santo Trafficante. In arguing his innocence, Judge Hastings puts forth a "rainmaking" defense. He states that William Borders was somehow taking advantage of his friendship with the judge, claiming that he could control Judge Hastings and, thereby, scamming organized crime figures by promising favorable treatment from Judge Hastings when, in fact, he had no such control. The House submits that this argument is not only unsupported, but, more importantly, it ignores the reality of the situation. In addition to the facts argued above, which indicate active participation in the conspiracy on the part of Judge Hastings, there is the undeniable fact that to "scam" an organized crime figure such as Santo Trafficante would be extremely dangerous. Without exception, witnesses who knew Trafficante testified before the Impeachment Trial Committee that a person who attempted to defraud him would be in a very dangerous situation. Santo Trafficante knew how to respond when defrauded of hundreds of thousands of dollars. That Borders would take such risks by making promises of favorable treatment by Judge Hastings that he could not actually guarantee is incredible. Judge Hastings' attempt to disassociate himself from Borders is wholly unpersuasive.

Judge Hastings entered a corrupt relationship with William Borders, attempted to sell his office for personal gain and destroyed the integrity of the Federal bench by doing so. The House of Representatives respectfully submits that Judge Hastings should be found guilty as charged in Article I.

C. ARGUMENT: ARTICLES II-XV

Articles II through XV of the Articles of Impeachment charge Judge Hastings with knowingly testifying falsely under oath 14 different times at his criminal trial. As established above, Judge Hastings entered a corrupt relationship with William Borders to obtain a bribe. When confronted with his crime, he lied under oath in order to obtain an acquittal.

Each of the 14 false statement articles charges a separate instance in which Judge Hastings lied to the jury about his participation in the bribery scheme. In each instance, he was addressing a critical part of the case. In each instance, he needed to explain away incriminating evidence. Judge Hastings did so by intentionally violating the oath he took to tell the truth -- an oath that is administered every day in his own courtroom and which he has a sworn duty to enforce.

1. Analysis of False Statement Articles

Article II

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that Judge Hastings and William Borders, of Washington, D.C., never made any agreement to solicit a bribe from defendants in United States v. Romano, a case tried before Judge Hastings.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

Article III

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that Judge Hastings never agreed with William Borders, of Washington, D.C., to modify the sentences of defendants in United States v. Romano, a case tried before Judge Hastings, from a term in the Federal penitentiary to probation in return for a bribe from those defendants.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

Article IV

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that Judge Hastings never agreed with William Borders, of Washington, D.C., in connection with a payment on a bribe, to enter an order returning a substantial amount of property to the defendants in United States v. Romano, a case tried before Judge Hastings. Judge Hastings had previously ordered that property forfeited.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

Three different times during the course of his criminal trial testimony, Judge Hastings unequivocally denied participating in a conspiracy with William Borders. Articles II, III and IV charge that the judge lied in each instance. The evidence in support of these articles is overwhelming. It is the same that has been presented in support of Article I. The House of Representatives respectfully submits that the Senate should find Judge Alcee Hastings guilty as charged in Articles II, III and IV.

Article V

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

> **The false statement was, in substance, that Judge Hastings' appearance at the Fontainebleau Hotel in Miami Beach, Florida, on September 16, 1981, was not part of a plan to demonstrate his participation in a bribery scheme with William Borders of Washington, D.C., concerning United States v. Romano, a case tried before Judge Hastings, and that Judge Hastings expected to meet Mr. Borders at that place and on that occasion.**
>
> **Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.**

Article V charges Judge Hastings with lying under oath about his appearance at the Fontainebleau Hotel. The judge testified at his criminal trial that he appeared as promised, not because he was in on the bribery deal, but because William Borders had asked to meet him at the hotel that evening. The evidence in the record establishes the incredibility of this claim. Judge Hastings appeared at the main dining room of the Fontainebleau Hotel, a little before 8:00 p.m., on September 16, 1981, to prove to the Romanos he was in on the scheme.

The majority of evidence in support of this conclusion has already been set forth in this memorandum. Two additional points, however, deserve emphasis. First, given how many people Borders told he was attending the Leonard-Hearns championship fight the very night of the Fontainebleau dinner, Judge Hastings must have also known about the trip. Borders and Pride discussed who was going to win. Even Borders and Rico discussed the fight. It defies common sense that when he talked to Judge Hastings four different times between September 1 and 11, Borders would remain silent about the trip he was taking on September 16. Nor does it make sense that Borders would risk blowing $150,000 by inviting Judge Hastings for dinner on a day everyone else knew he would be in Las Vegas, and at the very point in time when he and Judge Hastings were in such close contact allegedly regarding their friend Hemphill Pride.

The second point deserving emphasis is that Borders never doubted that Judge Hastings would show as promised at the Fontainebleau Hotel. Based on that appearance, Borders was to collect from Rico an upfront payment on the bribe on September 19. When Borders returned from Las Vegas to National Airport on September 18, he immediately changed planes and headed for Miami as if he knew all was well. Borders never spoke to Rico to determine whether Judge Hastings had shown. Judge Hastings has unequivocally testified that Borders did not immediately call to apologize for not showing up. Thus, the judge could not have inadvertently confirmed the show. How then did Borders know that the offer of proof had been satisfied? He knew because Judge Hastings was part of the bribery conspiracy.

THe House of Representatives submits that Judge Hastings intentionally lied to the jury about his appearance at the Fontainebleau Hotel. He did so in an effort to explain away highly incriminating evidence. His corrupt conduct demands removal from the Federal bench.

Article VI

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that Judge Hastings did not expect William Borders, of Washington, D.C., to appear at Judge Hastings' room in the Sheraton Hotel in Washington, D.C., on September 12, 1981.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

Article VI charges Judge Hastings with testifying falsely under oath about William Borders' appearance at the Sheraton Hotel on September 12, 1981. To explain away incriminating evidence of a planned meeting with Borders just hours after the first meeting with Rico, Judge Hastings told the jury that he did not expect to see Borders that night. According to the judge, he was surprised by Borders' appearance at his hotel room at 10:00 p.m. on a Saturday night. The evidence overwhelmingly establishes, however, that this testimony was false. Borders' arrival at the Sheraton was planned. He appeared in order to convey to Judge Hastings what had transpired at the first meeting setting up the bribery conspiracy.

As discussed in the Statement of Facts and in support of Article I, Judge Hastings' testimony in this regard is flatly contradicted by the testimony of other persons in his Sheraton Hotel room that evening. Donna Mendez Myrill, Margaret Dabreau

Owens and Jesse McCrary all state they were waiting for something, and they have no reason to lie. Indeed, they are Judge Hastings' friends. Moreover, William Borders' complicated and purposeful maneuvers to reach Washington, D.C. that night undermine Judge Hastings' unpersuasive testimony. Indeed, they deserve special emphasis.

On September 12, 1981, after meeting Rico and setting up the bribery deal, Borders left Miami at approximately 11:00 a.m. to attend a long-planned family reunion. He flew to West Palm Beach and drove an hour and 20 minutes to Ft. Pierce, Florida where the reunion was being held. Borders was not scheduled to return to Washington, D.C. until the next day, Sunday, September 13th.[181]

Within minutes of arriving at his family reunion, however, Borders got on the telephone. At 1:06 p.m., he made two airline reservations: one for an Eastern flight scheduled to depart that day from West Palm Beach to Atlanta at 4:12 p.m., and one on an Eastern flight scheduled to depart Atlanta for Washington, D.C. at 6:45 p.m. In order to take the first flight, Borders would have had to drive the 60 miles back to West Palm Beach.[182]

At 3:30 that afternoon, however, Borders cancelled his West Palm Beach - Atlanta flight and reserved instead an Eastern flight scheduled to depart Melbourne, Florida for Atlanta at 4:35 p.m.

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[181] 427-29; HX. 86; S.60, S.66.

[182] PT of Laverne Boone at 494-95; PT of Richard Lowe at 452; HX. 73; S.254, S.255, S.260.

Melbourne was also a 60 mile drive from the site of the family reunion.[183]

Borders made that drive. But he missed his flight. At 4:39 p.m., at the Melbourne Airport, Borders made a reservation on another Eastern flight, this one from Orlando, Florida which was scheduled to arrive Washington, D.C. at 10:00 p.m.[184]

Borders then drove another great distance to Orlando. Still, though, he was not satisfied. At the Orlando Airport, he cancelled his Washington, D.C. reservation and reserved an earlier flight to BWI. Ultimately, Borders took this flight. He arrived at BWI shortly before 9:00 p.m. Sometime after 10:00 p.m., he arrived at Judge Hastings' Sheraton Hotel room.[185]

The foregoing effort made by William Borders to return to Washington, D.C., as well as all the other evidence establishing that Judge Hastings and Borders had planned to meet at the Sheraton Hotel, establishes the judge lied under oath at his criminal trial. The House submits that his false testimony, as charged in Article VI, shows a flagrant disregard for the law and requires removal from office.

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[183] PT of Laverne Boone at 494-95; PT of Richard Lowe at 452; HX. 73.

[184] Id.

[185] 2245, 1455; PT of Laverne Boone at 494-95; PT of Richard Lowe at 452; HXs. 72, 73, 156 (at 1840-41, 2110-11); S.71, S.72.

Article VII

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement concerned Judge Hastings' motive for instructing a law clerk, Jeffrey Miller, to prepare an order on October 5, 1981, in United States v. Romano, a case tried before Judge Hastings, returning a substantial portion of property previously ordered forfeited by Judge Hastings. Judge Hastings stated in substance that he so instructed Mr. Miller primarily because Judge Hastings was concerned that the order would not be completed before Mr. Miller's scheduled departure, when in fact the instruction on October 5, 1981, to prepare such order was in furtherance of a bribery scheme concerning that case.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

Article VII charges Judge Hastings with testifying falsely at his criminal trial with respect to why, on October 5, 1981, he told his law clerk, Jeffrey Miller, to prepare the order returning a substantial amount of the Romanos' property. Judge Hastings contends that he gave the instruction because Miller was leaving chambers at the end of the month. While it is true that Miller was scheduled to leave at the end of October, the real reason that Judge Hastings told his law clerk to get out the Romano order that day was to implement a part of the bribery conspiracy.

The governing law requiring Judge Hastings to reverse the Romano forfeiture order existed as of June, 1981, and the judge was well aware of the law. Nonetheless, Judge Hastings did not acknowledge that the forfeiture must be reversed until September. By this time Borders had been informed by Dredge that the Romanos were showing an interest in the bribery deal. Then, Judge Hastings did not effectively follow through on his instruction to reverse his earlier order until the bribery scheme was in place, the down payment had been made, and the series of phone calls between Rico, Borders and Judge Hastings had occurred.

In addition, Judge Hastings put unusual pressure on his staff to get the order out, to the point where his deputy clerk sent the order special delivery.[186] He does not deny that he said to Marilyn Carter, "Sorry for the rush, but this must go out today." The judge did not put pressure on Miller to finish any other outstanding work prior to his departure. Moreover, Miller testified that Judge Hastings' instruction to get out the order "that day" was unusual.

The totality of the evidence establishes that Judge Hastings' explanation under oath as to why he wanted the Romano order out on October 5, 1981, was knowingly false and stated with the intention of misleading the jury. For the foregoing reasons, and for the reasons stated in support of Article I, the House submits Judge Hastings should be removed from office for this separate offense.

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[186] James Deichert, the prosecutor in the Romano case, testified before the Impeachment Trial Committee that he had never received any notice or order from the judge special delivery prior to October 6, 1981.

> **Article VIII**
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> **From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.**
>
> **The false statement was, in substance, that Judge Hastings' October 5, 1981, telephone conversation with William Borders, of Washington, D.C., was in fact about writing letters to solicit assistance from Hemphill Pride of Columbia, South Carolina, when in fact it was a coded conversation in furtherance of a conspiracy with Mr. Borders to solicit a bribe from defendants in United States v. Romano, a case tried before Judge Hastings.**
>
> **Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.**
>
> **Article IX**
>
> **From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trier of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.**
>
> **The false statement was, in substance, that three documents that purported to be drafts of letters to assist Hemphill Pride, of Columbia, South Carolina, had been written by Judge Hastings on October 5, 1981, and were the letters referred to by Judge Hastings in his October 5, 1981, telephone conversation with William Borders, of Washington, D.C.**
>
> **Wherefore, Judge Alcee L. Hastings, is guilty of an impeachable offense warranting removal from office.**

Articles VIII and IX both address the October 5, 1981, conversation between Judge Hastings and William Borders regarding "letters for Hemp." Article VIII charges the judge with knowingly testifying falsely at his criminal trial with respect to the meaning and purpose of that conversation, while Article IX alleges that Judge Hastings violated his oath by testifying that three documents were actual drafts of the letters, referred to in the conversation and written on October 5, 1981.

For all the reasons previously set forth in support of Article I, the October 5 conversation was not about "letters for Hemp," but rather conveyed information about the bribery deal. In addition, Judge Hastings' conduct, when he discussed the October conversation with Hemphill Pride during a drive to the Columbia, South Carolina airport, is further, compelling evidence that the judge lied under oath about the purpose and meaning of the October 5 call.

During that drive, Judge Hastings lobbied his best friend in an attempt to obtain Pride's agreement that the October 5 conversation was, in fact, legitimate. The judge told Pride it was important that he remember the letters. When that did not work, he stated that Pride did not need to know about the letters, for the defense would still stand up. He then tried to convince Pride that his and Borders' efforts were for real. Pride would have none of it. The House submits that Pride refused to go along with Judge Hastings' story because there never were any legitimate discussions between Judge Hastings and Borders about "letters for Hemp." It defies common sense that Judge Hastings' best friend would not know of efforts being made on his behalf. Moreover, given the very close ties between the two men, it makes no sense for Pride to refuse to help the judge if he could do so honestly.

With respect to the draft letters themselves, there is overwhelming evidence that they were fabricated by Judge Hastings to bolster his defense, thereby rendering his testimony about the documents knowingly false. The timing of the letters' production to the Government -- ten months after a discovery order required their production and only one month before Judge Hastings' criminal trial -- sets the stage of suspicion. The judge also admits that as early as December, 1981, near the time of his indictment, he knew that the draft letters would be critical to his defense to the October 5 call, yet neither in December, January nor February did he show the drafts to his principle counsel. His counsel then resigned in early March.

Further evidence that Judge Hastings lied in this regard are the draft letters themselves. As pointed out by the Vice Chairman during the Impeachment Trial Committee's hearings, the three letters are pristine. There are no strike outs, cross overs or changes on the six handwritten pages. Yet, according to Judge Hastings, he drafted the letters on the bench, while presiding over a jury trial requiring evidentiary rulings. His attention was divided, yet the letters reflect otherwise.

Finally, there is Judge Hastings' own suspicious behavior. He testified that he often drafts documents while on the bench and that it was his normal practice to give such drafts to his secretary to type when he got off the bench. However, he did not do so in this case. This is especially odd given that the judge allegedly did not change his mind about the propriety of the letters until he was home, late that night. Then there is the question why Judge Hastings bothered to save the letters. He testified that he affirmatively decided not to send the drafts because to do so would violate the Judicial Canon of Ethics. Thus, there was no reason to keep the letters hidden in his desk drawer as Judge Hastings purports to have done. Yet here they are, available when needed months later.

All of this evidence, in its totality, establishes that Judge Hastings' testimony regarding the October 5, 1981 conversation and the draft "letters for Hemp" was fabricated in an effort to hide the bribery conspiracy from the jury in his criminal case. He continued to lie before the Impeachment Trial Committee. His knowing violation of his oath, as charged in Articles VIII and IX, requires his removal from the Federal bench.

Article X

> **From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.**
>
> **The false statement was, in substance, that on May 5, 1981, Judge Hastings talked to Hemphill Pride by placing a telephone call to 803-758-8825 in Columbia, South Carolina.**
>
> **Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.**

Article XI

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that on August 2, 1981, Judge Hastings talked to Hemphill Pride by placing a telephone call to 803-782-9387 in Columbia, South Carolina.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

Article XII

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that on September 2, 1981, Judge Hastings talked to Hemphill Pride by placing a telephone call to 803-758-8825 in Columbia, South Carolina.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

Article XIII

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

> **The false statement was, in substance, that 803-777-716 was a telephone number at a place where Hemphill Pride could be contacted in July 1981.**
>
> **Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.**

Articles X through XIII charge Judge Hastings with knowingly testifying falsely under oath at his criminal trial about four telephone calls allegedly made to Hemphill Pride or to a place where Pride could be reached. At the conclusion of Judge Hastings' direct examination, Patricia Williams handed the judge various telephone records and asked him to identify four long distance calls that had been highlighted by check marks. In response, Judge Hastings unequivocally testified that three of the telephone calls reflected on the phone records were calls he had made to Hemphill Pride. He also testified, without reservation, that the fourth call was made by William Borders to a place where Judge Hastings knew Pride could be reached.

There is absolutely no dispute that Judge Hastings' testimony was untrue. Not one of the four phone calls was made to Hemphill Pride or to a place where Pride could be reached. Rather, the identified numbers belonged to a business contact of William Borders, a social acquaintance of Judge Hastings (who was called twice) and Patricia Williams' ex-mother-in-law, all of whom reside in Columbia, South Carolina. Judge Hastings has had to admit these facts. He contends, however, that he did not knowingly testify falsely about the calls. According to the judge, despite the fact he had a year to prepare for trial, he just made a mistake.

As established by the evidence, this excuse is incredible. Indeed, the very significance of the four phone calls establishes that the lies were intended to deceive the jury.

a. The Four Phone Calls Are Significant and Material

The four calls allegedly made to Hemphill Pride are critical because, aside from the fabricated letters themselves, they are the only documentary evidence Judge Hastings was able to produce at his criminal trial in support of his defense that he and William Borders were intimately involved in Hemphill Pride's problems. Judge Hastings knew he had to refute the Government's argument that the October 5 conversation between himself and William Borders was a coded exchange of information about the conspiracy. He knew that there would be no testimonial evidence besides his own self-serving claims that his frequent and extended contacts with Borders were allegedly about Hemphill Pride. Moreover, Judge Hastings knew that the record would be devoid of any evidence that his alleged strategy calls with Borders resulted in any action to benefit Pride. In short, he needed documentary evidence to bolster his claim.

Likewise, Judge Hastings knew that the draft letters themselves were insufficiently convincing, in view of the suspicious manner in which they were withheld from his own counsel and, until the eve of trial, from the Government. He also knew for at least a year before his own trial that Hemphill Pride would not support his story, for at William Borders' trial, Pride had testified that he did not know of any such letters, nor would he have wanted any. Pride had also denied a key element of the October 5 call: that Borders had spoken to Pride to get some further [financial] information from him. Thus, the four telephone calls to Hemphill Pride were critical. They allegedly documented Judge Hastings' and Borders' contact with Hemphill Pride. The telephone records were key evidence.

b. Judge Hastings Knowingly Lied About the Phone Calls

The facts set forth immediately above not only explain the significance of Judge Hastings' false testimony about the four phone calls, but also they establish that Judge Hastings knew that his testimony was false. In addition, there is compelling other evidence undermining Judge Hastings' incredible excuse that he just made a mistake.

The facts pertaining to the call actually made to the former mother-in-law of Patricia Williams, Judge Hastings' own defense counsel, illustrate the point most graphically. In this instance, Judge Hastings asks the Senate to believe that both he and Ms. Williams innocently made a mistake about an 18 minute telephone call, made from Ms. Williams' home, to a number that Ms. Williams had called 14 different times during the two and one-half years prior to Judge Hastings' trial. These facts are not only inconsistent with an innocent mistake, but also they illustrate Judge Hastings' reckless disregard for the truth.

Judge Hastings' explanation to the Impeachment Trial Committee about this call further compounds the incredibility of his excuse. At the hearing, he presented evidence that all the calls over the years to the former mother-in-law were actually made by Ms. Williams' daughter, thereby explaining how Ms. Williams could have been innocently confused. In 1976, however, when the records first indicate calls to the ex-mother-in-law from Ms. Williams' home, Ms. Williams' daughter was only five years old. Plus, one would have to assume that for years Ms. Williams did not review her telephone bills before paying them.

Moreover, in a further attempt to explain away his false testimony about the telephone call and to protect Ms. Williams from any implication of wrongdoing, Judge Hastings testified before the Impeachment Trial Committee that Ms. Williams had nothing to do with the identification of the four telephone calls. According to the judge, he hurriedly looked over the phone records and picked out the telephone calls the night before he testified in this regard, when Ms. Williams was indisposed.

A review of the record, however, establishes that this testimony, suspicious on its face, is also untrue. When Judge Hastings testified about the four calls at his criminal trial, Ms. Williams handed him the records and stated, "Judge, would you tell us about the first call that I indicated with a little check on the front page, there?" Judge Hastings then identified the call as one he made to Hemphill Pride. Minutes later, Ms. Williams stated, "Now, would you seek out the second call that I have indicated on those toll records with a little check?" Judge Hastings complied, again stating that the call was to Hemphill Pride.[187]

Further evidence that Judge Hastings knowingly testified falsely about the four phone calls is the unequivocal, definitive manner of his testimony. Judge Hastings is a district court judge, and an experienced trial attorney. He knows the import of taking an oath to tell the truth. He also knows that an attorney has an obligation to investigate the facts before presenting them in court. Therefore, if the judge were as hasty in identifying the telephone calls as he claims, and had made no effort to verify their accuracy, one would think his testimony would reflect at least some hesitancy. It does not.

Indeed, Judge Hastings' testimony at his criminal trial about the four phone calls suggests that he had corroborated his information. For example, in response to questions posed by Ms. Williams, the judge testified as follows:

Ms. Williams:	And to whom was that call placed?
Judge Hastings:	I know for a fact that this particular call was placed to Hemphill Pride.
Ms. Williams:	Did you speak with Hemphill Pride?
Judge Hastings:	I certainly did."
Ms. Williams:	On that day?
Judge Hastings:	I certainly did."[188]

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[187] See HX. 156 (at 2048-49) (emphasis supplied).

[188] HX. 156 (at 2048-49) (emphasis supplied). The same misplaced certainty was exhibited in the hearings before the Senate Impeachment Trial, where, for example, Judge Hastings testified that the only reason William Borders was at his investiture was

In short, Judge Hastings' own testimony is inconsistent with his defense.

Finally, it must be emphasized that even if Judge Hastings failed to inquire as to whether the four phone calls were actually to his friend Hemphill Pride -- either by asking his own counsel, the telephone company, Pride or consulting his own personal listing of telephone numbers -- that does not constitute an adequate legal excuse to the charges contained in Articles X through XIII. While mere negligence may not rise to the level of the intent required by the element of "knowingly" testifying falsely, courts have held that when a "defendant deliberately closed his eyes to what would otherwise have been obvious to him," the trier of fact may infer "willfulness."[189] Judge Hastings' knowledge of the falseness of his testimony and intent to mislead the jurors may be inferred from his willful blindness to the existence of a certain fact or facts.[190]

In summary, the evidence is overwhelming that Judge Hastings intentionally lied about the critical telephone calls to South Carolina. His feeble excuse of a mistake has no basis in the record, defies common sense and is a reflection of one fact -- his

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because of his position as President of the National Bar Association. Presumably, Judge Hastings so testified in order to negate the assumption that he and Borders were close, a contention which he pressed during his criminal trial. However, during cross-examination, he was forced to admit that Borders was not the NBA President at that time.

[189] United States v. Martin, 773 F. 2d 579, 584 (4th Cir. 1985).

[190] Id.; United States v. MacKenzie, 777 F.2d 811, 818 n.2 (2d Cir. 1985)

falsehoods, unknown at trial, have now been discovered. The Senate should find Judge Hastings guilty as charged in Articles X through XIII.

Article XIV

> **From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.**
>
> **The false statement was, in substance, that on the afternoon of October 9, 1981, Judge Hastings called his mother and Patricia Williams from his hotel room at the L'Enfant Plaza Hotel in Washington, D.C.**
>
> **Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.**

Article XIV charges Judge Hastings with knowingly testifying falsely at his criminal trial with respect to two telephone calls allegedly made from the L'Enfant Plaza Hotel. The significance of this testimony derives from the fact that Judge Hastings used this evidence to refute the inference of guilty flight arising from his hasty departure from Washington upon learning of Borders' arrest. The argument that the judge's "flight" supported an inference that Judge Hastings had conspired with William Borders had been successfully raised in United States v. Borders,[191] and Judge Hastings knew it would be raised again at his criminal trial.

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[191] 693 F.2d 1318 (11th Cir. 1982).

Judge Hastings testified at his trial that he hurried home not because of fears that he would be arrested or questioned before he had thought through his story, but because his mother had learned about the arrest and was "hysterical," having already been confronted by reporters. "You come home," he claims she instructed him. "My express purpose," he testified, "was to see about my mama and it's just that clear."[192]

His call to his fiancee and later defense attorney, Patricia Williams, also gave him reasons to return home promptly, he claimed. Ms. Williams allegedly told him not only that his staff was being interviewed by the FBI, but also that in her own FBI interview, she had been asked about the judge's financial condition, the Fontainebleau, and William Borders, all of which led Judge Hastings to start worrying that Borders had implicated him.[193] After pondering this, Judge Hastings supposedly made his decision to go home.

Documents establish that Judge Hastings spoke to his mother from BWI airport at 4:37 that afternoon, and to Ms. Williams several times from the airport a few minutes later. However, reliance on those records would not support his testimony, since by then he was already on his way to Florida. His guilt induced flight was already underway. Accordingly, Judge Hastings lied and told the jury that he had called them before packing his bags and leaving the hotel. To explain why Pride did not corroborate the

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[192] HX. 156 (at 1914, 1924).

[193] Id. (at 1915-18).

fact of these calls, he further lied by claiming that after Pride advised him of Borders' arrest, he returned to his room alone, and completed his two calls just "a minute or two" before Pride rejoined him.[194]

The evidence demonstrating that this testimony was false is overwhelming. Indeed, faced with this evidence, in the proceedings before the Impeachment Trial Committee, even Judge Hastings seems to be retreating from his earlier certitude.[195]

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[194] Id. (at 1916).

[195] Before the Impeachment Trial Committee, Judge Hastings' direct testimony proceeded as follows:

> **MR. ANDERSON:** Judge, let me, before we get you back in the cab, go back to your room. You indicated you made two calls after you came back from Hemphill.
>
> **JUDGE HASTINGS:** You know, Professor Anderson, I don't want to buy into Agent Mazzella's notion with reference to in every instance people get time things confused, but I was in a state of shock about Borders' arrest and the fact that there was some kind of indication that the arrest surrounded something having to do with my responsibilities as a judge could cause me to be confused. I don't beg out of that. I know that I talked to my mom and I know that I talked to Patricia. 2267.

Then, minutes later, Judge Hastings testified:

> . . .[W]hen I spoke to [my mother], either at the L'Enfant Plaza or at Baltimore, I could hear banging on the doors and loud noises and I could sense her concern. 2269.

Compare this with his testimony at his criminal trial discussed above, as well as the testimony of his mother. In response to a question pertaining to "what she told Al Hastings that she was experiencing which affected his actions from Washington, D.C.," Mrs. Hastings stated: "They [reporters] were . . . bamming on the screen and even peeking in the windows until I drew the shades. . . .[The first time my son called] he could hear them." PT of Mildred Hastings at 2052.

The evidence establishing Judge Hastings' guilt on Article XIV consists of testimonial and documentary evidence coming from a variety of sources. To believe Judge Hastings, one must disbelieve Hemphill Pride, FBI agents, Patricia Williams herself, the Comptroller of the L'Enfant Plaza Hotel, and documentary evidence consisting of records from the telephone company, the hotel, and from Judge Hastings' own condominium complex.

As noted above, Hemphill Pride testified that from the time he advised Judge Hastings about Borders' arrest until he accompanied Judge Hastings to the hotel lobby to leave, Pride was constantly with Judge Hastings and saw him make no telephone calls. Patricia Williams, in a letter to Judge Hastings dated October 14, referred to his having called her on October 9 "from Baltimore." No mention was made of calls from the hotel.

There is also circumstantial evidence that neither calls could have been made at the time and place claimed. From other evidence it is known that if Judge Hastings made any calls from the hotel,

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See also Respondent's Answer to Article XIV in which he "denies that the substance of these statements was false or intended to mislead the triers of fact and states that these statements were, at the time they were made, true to the best of his recollection and belief and were made to enable the jury to reach a true verdict." (Emphasis added) Compare this with the less equivocal language used in answer to other false testimony articles. In answer to Article IX, for example, he merely "denies that the substance of his statement was false or intended to mislead the jury and states that it was true and made to enable the jury to reach a true verdict."

they would have to have occurred between about 2:45 and 3:40 p.m.[196] During that time period, neither Mrs. Hastings nor Ms. Williams could have obtained the information which Judge Hastings claims he received during those calls. With respect to his mother, the security logs at the Hastings' residence, which required guests to sign in at the guard's office before entering the complex, show no reporters present in the complex that day until around 8 p.m.[197] Likewise, because Ms. Williams was being interviewed by the FBI during the critical period, she could have spoken to neither the judge nor his chambers' staff.[198]

Perhaps the most objective and compelling evidence in support of this article is the billing records of long distance calls from guest rooms at the L'Enfant Plaza Hotel. First, there are the bills for the suite of rooms occupied by Judge Hastings and William Borders. Although Judge Hastings says he charged these calls to his room, the bills do not reflect any long distance calls for the relevant time period.[199] Second, there are the records generated for all long distance calls charged to all the guest rooms at the hotel on October 9. Again, these computer-generated records show no calls being charged to a guest room during this time period, thereby negating the possibility that the room bill was incorrect because the call had been billed to another room.[200] Nor is there any evidence that the computer billing system was in any way defective or "down" at any time that day.[201]

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[196] Judge Hastings had to leave the hotel by about 3:40 p.m. to get to BWI by 4:37 p.m., when he called his mother, since it would have taken at least an hour to get there by taxi during Friday afternoon traffic. He could not have called from the hotel before 2:45, because it was at that time that Borders' attorney, John Shorter was asked by Special Agent Murphy to relay a message to the judge to call the FBI.

[197] 2357-58.

[198] Even if it is assumed that the very brief call she received during the interview from a person both Ms. Williams and her secretary identified as a client was actually from Judge Hastings, Ms. Williams still would have had no opportunity to speak to the judge's staff prior to talking to him.

In sum, the totality of the evidence establishes that Judge Hastings lied about why he left the L'Enfant Plaza after learning of William Borders' arrest. He did not made any phone calls to his mother or Patricia Williams prior to his rushing from the hotel. He testified falsely in this regard to deceive the trier of fact and should, therefore, be convicted on Article XIV.

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[199] HXs. 130, 131, 217. The possibility that Judge Hastings was mistaken, and in fact charged his calls to his home or business, or called collect, is refuted by the absence of any charges for such calls on these billing records. 751, HXs. 31, 136, 137.

[200] 805-24, HX. 140.

[201] In addition to the testimony of the hotel's comptroller denying any problem during that day and night, 839-41. there are records that reflect that the system was working, e.g. the bill for the suite occupied by Borders and Judge Hastings and the computer records do reflect a long distance call much later that night from those rooms, and the computer slips for all the hotel's guest calls include calls throughout the day. HXs. 140, 143. For example, a call was placed at 2:29 p.m. to Pennsylvania, and another at 4:00 p.m. to New Jersey. Moreover, there was nothing wrong with the system so far as calls to the area code in which Mrs. Hastings and Ms. Williams lived, as a 10:00 p.m. call reflects. 813, HX. 140.

Article XV

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact concerning his motives for taking a plane on October 9, 1981, from Baltimore-Washington International Airport rather than from Washington National Airport.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

Article XV charges Judge Hastings with knowingly testifying falsely concerning why on October 9, 1981 he fled Washington, D.C. via BWI rather than from National Airport. As explained in support of Article I, that motive was not to catch a direct flight to Ft. Lauderdale, but rather to avoid the FBI until he had time to consider the evidence the Government might have against him, and to invent a plausible explanation.[202]

As with the preceding article, the significance of this false testimony pertains to the inference of guilt that could be inferred by the jury from the Judge's manner of fleeing the Washington area.

Judge Hastings knew Washington, D.C. He had attended law school here, and had traveled to Washington many times, flying into and out of National Airport. Accordingly, on October 9, he knew where National was located, and which airlines flew from there to Miami and Ft. Lauderdale. Moreover, he was an experienced traveler; his itinerary for 1981 was so busy that it raises questions as to how he handled his regular workload. So there is no question he knew how to find out about flights and seat availability. Nevertheless, on the afternoon of October 9, Judge Hastings got into a cab headed for BWI without making any reservations or indeed, without even knowing if there was any hope of getting home that night from Baltimore. Allegedly, he did not consider the possibility that a flight from National, just minutes away from the hotel, would be more convenient. Nor did he mention to Hemphill Pride, who had offered him a lift to the airport, that he meant to go to Baltimore, not National.[203]

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[202] HX. 156 (at 1923).

In fact, just a few months before, Judge Hastings had returned to Florida on a direct flight from National. On October 9, that same flight was still on Eastern's schedule, and had 14 seats available. Moreover, once at BWI, Judge Hastings did not try to book a flight until an hour after he arrived, and then did so on a non-direct flight. Judge Hastings would have the Senate believe that in his haste to get back home to take care of his mother, he did not take five minutes to find out that he could have gotten back to Florida many hours earlier.[204]

Judge Hastings would also have the Senate believe that it is merely coincidence that the very places he avoided -- the hotel, National Airport and Miami International Airport (where his car was parked) -- were the places the FBI was most likely to look for him. There is also evidence that he never went to his home, despite the fact that he claimed his priority in returning to Florida was to take care of his mother.[205] And, if he had no reason to avoid the FBI, why did he wait for them to figure out where he was, rather than calling, as he had been asked to do? The clear implication is that Judge Hastings was running -- not forever, not to Brazil -- but for long and far enough to give him time to get his wits together, for as he himself admitted, after he learned of William Borders' arrest, he was in a state of shock.[206] That shock arose not from the ambiguous information he learned from Pride,[207] nor from the information he allegedly got from Patricia Williams before he left for the airport, but from his knowledge that the hammer had fallen.

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[203] HXs. 68-70, 156 (at 1922-23, 2218, 2225); RX. 139.

[204] HXs. 78, 134, 156 (at 2222-23); S.181, S.192, S.267.

The House of Representatives submits that Judge Hastings is guilty as charged in Article XV.

2. Impact of Article I on Articles II - XV

The final issue to be addressed with respect to Articles II through XV is how a Senator's vote on Article I affects his or her vote on the false statement articles. If a Senator finds Judge Hastings guilty of conspiring with William Borders to obtain a bribe and therefore votes to convict on Article I, that Senator may and, in fact, should convict Judge Hastings of lying under oath on any one or all of the next 14 articles. If, however, a Senator votes to acquit on Article I, the question arises whether it is still possible to convict Judge Hastings on any of the false statement articles. The answer is unequivocally yes. A not guilty vote on Article I is not dispositive of all these articles.

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[205] In his interview later that night with the FBI, Judge Hastings indicated that he called his mother. He made no mention of stopping by, nor did his mother mention that fact when she was questioned by the FBI. *See* RX. 42.

[206] 2267.

[207] Pride told Judge Hastings only that Borders had been arrested in connection with bribery in his courtroom.

The House in no way concedes that Judge Hastings is innocent of the charges brought against him. He conspired with William Borders and lied to the jurors to persuade them otherwise. For the purposes of argument, however, the House will assume that a Senator may vote to acquit on Article I.

What is the impact of such a finding on the next fourteen articles? A decision that the evidence is insufficient to convict on Article I would be dispositive of some, but not all, of the false statement articles. With respect to Articles VI and X through XV, an acquittal vote on Article I is clearly not dispositive, for these seven false statement articles are independent of Article I and require separate, thorough consideration.

If a Senator concludes that the evidence does not sufficiently establish that Judge Hastings conspired with William Borders to obtain a bribe, then that Senator must necessarily accept as true Judge Hastings' explicit denials at his criminal trial of participating in the conspiracy (Articles II-IV). Moreover, a Senator would also have to accept as true the judge's explanations of a) the dinner at the Fontainebleau (Article V), b) his order to

Jeffrey Miller to complete the Romano order that day (Article VII), and c) the October 5 conversation involving the "letters for Hemp" (Articles VIII and IX). These portions of Judge Hastings' testimony arguably go directly to his participation in the bribery scheme. A finding that the evidence fails to establish Judge Hastings' participation in that scheme requires a finding that he testified truthfully about this incriminating evidence. Likewise a finding that he testified falsely about any of this evidence would compel a conviction on Article I.

The seven other false statement articles are, however, a different matter. Article VI and Articles X through XV focus on explanations Judge Hastings gave at his criminal trial that are independent of his participation in the corrupt scheme.

All the false statements alleged in Articles VI and X through XV are instances in which Judge Hastings attempted to bolster his defense to explain indirect incriminating evidence. The false statements do not go directly to his participation in the conspiracy. For example, Articles X through XIII are the four alleged phone calls to Hemphill Pride in Columbia, South Carolina. As explained above, Judge Hastings identified these calls to bolster his defense that he was deeply involved in Pride's problems, which led to the draft letters in support of Pride. But even if Judge Hastings was not part of a conspiracy, he still could have knowingly lied about the phone calls in order to have documentary support for his defense.

The same is true with respect to Articles VI, XIV and XV. Article VI charges that Judge Hastings lied when he testified to his surprise at Borders' arrival at the Sheraton Hotel, Article XIV addresses the alleged phone calls to Judge Hastings' mother and Patricia Williams from the L'Enfant Plaza Hotel, while Article XV charges that Judge Hastings lied under oath with respect to why he went to BWI rather than National when he fled Washington, D.C. In each case, the testimony is independent of the sufficiency of the proof of Judge Hastings' participation in the conspiracy. For example, whether or not Judge Hastings made the calls or planned to see Borders on the night of September 12 does not directly show that he was in on the scheme. Thus even if a Senator were to vote to acquit Judge Hastings on Article I, he or she could still find that the judge lied about his knowledge that Borders would return on September 12, fabricated the phone calls and failed to explain truthfully why he avoided National Airport. In short, Judge Hastings lied to the jury to bolster his case.

It is important to realize that each instance of false testimony charged in the false statement articles is more than enough reason to convict Judge Hastings and remove him from office. Even if the evidence were insufficient to prove that Judge Hastings was part of the conspiracy with William Borders, which the House in no way concedes, the fact that he lied under oath to assure his acquittal is conduct that cannot be tolerated of a United States District Judge. To bolster one's defense by lying to a jury is separate, independent corrupt conduct. For this reason alone, Judge Hastings should be removed from public office.

PART TWO

ARTICLE XVI

DISCLOSURE OF CONFIDENTIAL INFORMATION

Two and a half years after his criminal trial on the bribery conspiracy, Judge Hastings committed a wholly separate impeachable offense, related to his earlier acts of conspiracy and false testimony only in that his reprehensible behavior emanated from the same callous disregard for the law. This additional offense was to disclose to an unauthorized person highly confidential information which he had learned as the supervising judge of a judicially authorized wiretap. Article XVI charges Judge Hastings with this separate intolerable conduct.

A. STATEMENT OF FACTS

1. The Underlying Investigation

In September, 1984, the FBI began an undercover investigation of Local 1922 of the International Longshoremen's Association in Miami, Florida. Through this investigation, the Government sought to explore union corruption, including allegations that kickbacks were being solicited for union membership. This probe led to additional investigations, interconnected by common subjects, pertaining to zoning corruption in a local municipal government and narcotics involvement in a local police force.[208]

In early 1985, the FBI, working with the United States Attorney's Office in Miami, decided to penetrate Local 1922 using an informant named Johnny Rivero. By July, 1985, Rivero had reported a broad variety of illegal activities, not only confirming corruption within the union, but also corruption in zoning matters in the city of Hialeah, and police involvement in the importation of illegal drugs in North Bay Village, Florida.[209]

It was decided that a wiretap would be needed to identify in advance the time and place for the payoff of corrupt union officials. Accordingly, on July 15, 1985, Assistant United States Attorney Roberto Martinez, who was the attorney in charge of the undercover investigations, applied to the duty judge for that month, Judge Hastings, for an authorization to institute a wiretap under 18 U.S.C. 2516, generally referred to as Title III. It was confidential information Judge Hastings learned through his supervision of this wiretap that he is charged with having disclosed to Dade County Mayor Stephen Clark, as alleged in Article XVI.[210]

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[208] 1026-27, 1174, 1176-77; S.289.

[209] 1026-27, 1028-30, 1091-92, 1176-77; HXs. 160-61.

[210] 1031-32; HXs. 160-61.

2. Information Provided to Judge Hastings

On July 15, 1985, Judge Hastings was presented with the application for the wiretap and a supporting affidavit, which explained the details and background of the union investigation and its targets, and the need for a court-ordered wiretap. Judge Hastings signed the necessary orders approving the wiretap and, as required by statute, he signed an order placing the documents under seal, thereby rendering the information confidential. In the months that followed, weekly progress reports and a request for an extension of the authorization were also presented to the court; each time, Judge Hastings reviewed and signed the report and placed them under seal.[211]

These reports to the court described the information that had been obtained through the wiretap and related investigation, and included the facts that ultimately and indisputably were disclosed to Mayor Steve Clark. Although the mayor was not a subject of the investigation, the reports frequently alluded to him. On several occasions, these references were also specifically discussed by Judge Hastings and the Federal investigators who presented the reports to him.

The first such discussion occurred when the Second Progress Report was submitted on July 29, 1985 by Assistant U.S. Attorney Roberto Martinez. At that time, Martinez specifically directed Judge Hastings' attention to the part of the report that discussed zoning corruption in the city of Hialeah because it was a new area of criminal activity revealed by the investigation. The informant, Rivero, had discussed with Kevin "Waxy" Gordon, a zoning code enforcer in the city of Surfside, Florida, who was one of the targets of the wiretap, the possibility of obtaining zoning changes and licenses for an amusement operation. That enterprise was actually a front established by the FBI to investigate illegal zoning practices in Hialeah. During a discussion of favorable locations for such an operation, Gordon had mentioned the location of another business that Gordon had placed. The report quotes Gordon as saying, "We cheated a little to get him in there to begin with, he's a friend of the Mayor's," meaning Stephen Clark.[212]

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[211] 1034, 1090-91; HXs. 160-83.

On August 15, 1985, the Government applied for a thirty day extension of the wiretap. The supporting affidavit contained the same references to Mayor Clark that had appeared in the earlier weekly progress reports, including the fact that Gordon was reported as having told Rivero that he had Mayor Clark in his pocket, that he had raised $40,000 in contributions for the mayor, and that Gordon was going to approach the mayor for assistance regarding the off-loading of narcotics.[213]

The FBI case agent for the undercover operations, Geoffrey Santini, presented this wiretap extension application to Judge Hastings in his chambers. Judge Hastings remarked that at first, he thought "Waxy" Gordon was the radio station. (At that time, there was a radio station in Miami with the call letters WAXY.)

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[212] 1028-29, 1036-38; HX. 168.

[213] 1037-38, 1091; HXs. 170, 172-73.

Judge Hastings further stated to Santini that Waxy Gordon was like the radio station: if he "didn't keep his mouth shut, he was going to get everyone into trouble, including the mayor."[214]

In the next submission reviewed by Judge Hastings, dated August 22, 1985, there was a further reference to Mayor Clark in connection with Gordon's illegal plan to obtain zoning changes in the city of Hialeah: Gordon had told Rivero and an FBI undercover agent, "Gino," that in order to take care of zoning problems for the project in Hialeah, as much as $10,000 would have to be paid to the mayor of Hialeah, who is "a close friend of Steve Clark."[215]

The following week, the Progress Report of August 29th contained the another reference to Mayor Clark. At a gathering attended by Rivero, Gordon, Mayor Clark and others, Gordon introduced Rivero to Clark and, in Clark's presence, told Rivero that the mayor would take care of the Hialeah matter. Mayor Clark then said, "If you have any problems with that thing in Hialeah get in touch with me." When asked by Gordon for the name of his contact, Clark responded, "Silvio Cardosa. If you have any problems with him, get back in touch with me."[216]

Assistant U.S. Attorney Martinez presented this report to the judge while he was on the bench. Judge Hastings then indicated that he wanted to speak with him, and they went to the judge's chambers. Once there, Judge Hastings observed, "Pretty heavy stuff." Martinez replied, "Do you mean Mayor Clark?" and the judge answered affirmatively. Martinez then told the judge that Mayor Clark was not a target of the investigation, that he had been introduced by Gordon to Rivero as someone with contacts to Hialeah Councilman Silvio Cardosa who, according to Gordon, would have to be taken care of in order to obtain zoning and licensing changes. Judge Hastings then indicated that he had heard that there were Hispanic politicians in the area that were involved in corrupt zoning practices. Indeed, Hialeah City Councilman Cardosa had been described in the press as being involved in corrupt zoning practices.[217]

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[214] 1090-93; S.290.

[215] 1039; HX. 178.

[216] 1041; HX. 179.

Martinez went on to explain the nature of the Hialeah zoning investigation to Judge Hastings -- that Gordon appeared to be well-connected, that he claimed to have made illegal influence payments in the past and that he would do so in this case for Rivero and Gino in connection with the amusement operation. After Martinez remarked that Mayor Clark had walked into the picture when Gordon introduced him to Rivero, and that was the extent of it, Judge Hastings responded, "Clark better be careful because he could get in trouble hanging around Waxy."[218]

The final reference to Mayor Clark prior to the disclosure of information that indisputably took place was submitted to Judge Hastings just one day prior to that leak: in the Progress Report of September 5, 1985, Gordon is reported as again stating that

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[217] 1040-41, 1071.

[218] 1040-41.

Steve Clark's man in Hialeah was Cardosa. In addition, Gordon told both Rivero and Gino that he had made a connection with the Hialeah Zoning Commission through Mayor Clark, and that if zoning problems arose, they would be handled.[219]

Before the Impeachment Trial Committee, Judge Hastings conceded that the accounts by Assistant U.S. Attorney Martinez and Special Agent Santini as to their conversations with him about the wiretap reports were essentially accurate, that he had reviewed the reports and that his sole source of information about the Hialeah investigation as it involved Mayor Steve Clark was from those discussions and reports.[220]

3. The September 6, 1985 Meeting of Judge Hastings and Mayor Clark

On September 6, 1985, Mayor Clark attended a meeting at the Miami Hyatt Regency Hotel of a community service organization to promote black-white community relations in the Miami area, of which he was a co-founder. Judge Hastings was the guest speaker at the breakfast meeting. It was at that conference that Judge Hastings took Mayor Clark aside, and gave him the warning that he should stay away from "Waxy" Gordon.[221]

Both Judge Hastings and another participant at the conference, Monsignor Bryan Walsh, testified that Judge Hastings spoke with

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[219] 1043-44; HX. 180.

[220] 1277, 1289-92.

[221] 1122-23, 1283; HX. 189.

Mayor Clark at the conference, prior to Judge Hastings' speech. Mayor Clark recalls the surreptitious conversation with the judge occurring later, after Judge Hastings had delivered his speech.[222]

In any event, Mayor Clark unequivocally testified that on the morning of September 6, 1981, after he greeted the judge, Judge Hastings said to him in a low tone, "Stay away from Kevin Gordon, he's hot, he's been using your name in the Hialeah area." Mayor Clark was astounded and did not respond at all.[223]

4. Mayor Clark Repeats the Disclosure to the Wiretap Subject

After this encounter, Mayor Clark called a colleague, Peter Ferguson, and asked him if he knew how to contact Kevin Gordon and, if he could, to ask Gordon to meet the mayor at 11:30 that morning. Ferguson was able to contact Gordon, and because Gordon was a target of the wiretap, that call was intercepted. The time of the interception was 8:58 a.m.[224]

Upon learning of this call, Special Agent Santini immediately instructed the informant, Rivero, to arrange to meet Gordon at the appointed time and place to learn why Mayor Clark wanted to meet with Gordon. Although he was unable to hear the discussion, Rivero reported that after the meeting Gordon was extremely upset and avoided Rivero.[225]

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[222] 1123-24, 1169-73.

[223] 1123-24.

[224] 1095, 1124; HXs. 185a-b.

At that meeting, Mayor Clark confronted Gordon with the information he had learned from Judge Hastings. Mayor Clark asked, "What are you trying to do to me? I understand you're using my name for influence out in the Hialeah area, and if you are, you'd better stop." In the face of Gordon's denials, the mayor then informed Gordon that he had it from a "very authoritative source that you're using my name in the Hialeah area." Gordon pressed the mayor for the source of his information. Ultimately, Mayor Clark told him that the information came from a Federal judge. After further pumping, Mayor Clark finally told Gordon his source was Judge Alcee Hastings.[226]

Gordon was visibly shaken by this information; he turned white and the conversation then ended.[227]

5. The FBI Learns of the Leak

The FBI learned of the leak to Mayor Clark only because three days later Gordon recounted his discussion with the mayor in a conversation on one of his wiretapped telephones. In a call at 9:23 a.m., on September 9, 1985, Gordon told an acquaintance that his meeting with Mayor Clark, "Wasn't good news, wasn't bad news, but it was in fact it was probably a favor. Just tipped me off to

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[225] 1104.

[226] 1124-25.

[227] 1124-25.

. . . ." Gordon then said he would call the friend back, stating that he did not trust the phone.[228]

About an hour and a half later, Gordon called back on another telephone (which also was tapped) and told his friend that Mayor Clark had told him that Alcee Hastings, a Federal judge, had talked to him, and that there was a rumor that Gordon was involved with Clark, Ferguson and some councilman in Hialeah on some deal. Gordon then said that the only thing in which he was involved in Hialeah was on "a new item for this guy from Houston," and which had to do with mitigating a zoning problem.[229] Gordon was puzzled, claiming that he had not done anything illegal on the deal and that Clark was not involved. Gordon then observed that for a Federal judge to know of the matter, it had to be "pretty high in the Justice Department or someplace." Gordon's friend noted that the investigation into zoning in Hialeah had been a big deal in the newspaper six or seven months earlier. Gordon then wondered aloud how his name had been put in to it.[230]

After listening to the tape of the two calls between Gordon and his friend, Special Agent Santini immediately contacted Rivero and instructed him to watch out for himself, that there could be a problem and to try to contact Gordon to find out what was going on. Agent Santini did not, however, inform Rivero of the nature of the problems. Precautions were then taken to protect Rivero.[231]

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[228] HXs. 186a-b.

[229] The FBI undercover agent, Gino, who was trying to obtain assurances that necessary zoning approval would be obtained for the amusement project, had posed as being from Houston. 1029; S.318.

[230] HXs. 187a-b.

On the following day, September 10, 1985, Rivero met with Gordon. Gordon appeared to be very upset and he patted Rivero down. He then told Rivero that on the previous day, Judge Hastings had asked Mayor Clark if he knew Kevin Gordon, and then the judge told him that Gordon's home and office phones were wired. When Rivero reported this back to Agent Santini, he was extremely agitated and fearful.[232]

Gordon also became highly suspicious of Gino. Gordon later told the FBI that after Mayor Clark made the disclosure to him, he went to check out Gino's local office, which increased his suspicion and anxiety. This statement corroborated an intercepted call made by Gordon right after the September 6 meeting, in which Gordon stated that the meeting with Mayor Clark had gone badly, and the next day was also a very bad day. Gordon confirmed in his interview with the FBI that this had been the day he had investigated Gino's business.[233]

6. The Compromise of the Underlying Investigations

It was now apparent that Gordon had immediately recognized the significance of the information Mayor Clark had passed along, even going so far as to surmise that a wiretap on his telephones had been ordered. Two of the three undercover operations were now compromised.[234]

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[231] 1104.

[232] 1104-05, 1107-08, 1175-76.

[233] 1180.

Representatives of the FBI, the Public Integrity Section of the Criminal Division of the United States Department of Justice, and the United States Attorney's Office in Miami met to determine whether the undercover investigations could continue. Since Gordon was the central figure in the Hialeah probe, and had immediately suspected Gino after the disclosure became known, there was no alternative but to close this investigation. Gordon had also played a role in the union investigation, having unsuccessfully tried to get Rivero admitted to the union through his political contacts. In addition, he had introduced Rivero to the target who was attempting to get Rivero on the docks through his mob connections. Particularly given the violent nature of some of the suspects, who included organized crime figures, the investigation had become too risky for Rivero, the undercover informant, so it too, had to be terminated immediately. The cocaine deal involving corrupt North Bay Village police officers engaging in drug smuggling was considered to be sufficiently isolated from Gordon to continue.[235]

7. The Investigation of the Leak

After decisions were made as to the course of the three on-going undercover investigations, and after Rivero had corroborated the interception of September 9, 1985, the Government was faced with investigating the leak. The approach was to focus on the other participant in the September 6 conversation with Gordon: Mayor Steve Clark. The investigators decided to wire Rivero to record conversations with him.[236]

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[234] 1047, 1107-08.

[235] 1046, 1176-77.

On October 11, 1985, Rivero attempted to speak to the mayor. However, the mayor's colleague, Peter Ferguson, and another individual interceded. They stopped Rivero in his tracks, told him to put his cards on the table and tried to convince him that Judge Hastings had not told Mayor Clark anything.[237]

Because Rivero then appeared to be under heavy suspicion, the Government decided to seek Gordon's cooperation. To induce his help, the investigators pursued Gordon's previously stated offers to Rivero to obtain narcotics. Rivero thereafter bought drugs from Gordon on two occasions. On November 18, 1985, Gordon was confronted with the narcotics transactions and he agreed to cooperate. Gordon was then debriefed, and he agreed to assist fully both with respect to the leak investigation and any other potential illegal activities in which he was involved.[238]

In his interviews, Gordon confirmed the content of his September 6 conversation with Mayor Clark, and acknowledged that this had made him suspicious of his telephones and of Gino. Gordon consented to wear a body recorder and to attempt to engage Mayor

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[236] 1178.

[237] 1178-79, 1194-95.

[238] 1178-80.

Clark and Ferguson in conversations about the disclosure. On December 18, 1985, Gordon and Ferguson met and discussed this matter. In that conversation, Ferguson stated that he thought Rivero could not be trusted, that he was a DEA agent. With respect to Gino, Ferguson also voiced distrust. After Gordon asked Ferguson who he thought was the source of the information, Ferguson concurred with Gordon that Judge Hastings was involved.[239]

On January 17, 1986, Gordon recorded a conversation with Mayor Clark about the leak. In that discussion, Mayor Clark essentially repeated to Gordon what he had told him on September 6: while at a function at the Hyatt Regency Hotel, where Judge Hastings was a guest speaker, the judge had warned Clark not to get near Gordon, because Gordon was involved in some zoning in Hialeah, and he had problems.[240]

Gordon died of a heart attack on February 20, 1986, so further attempts to have him record conversations were precluded. Shortly thereafter, the FBI made their arrests in the North Bay Village case. The following day, the leak investigation went overt, with the FBI conducting simultaneous interviews of Mayor Clark, Peter Ferguson, the friend Gordon had spoken to on September 9 about the disclosure, and the individual who had joined Ferguson in preventing Rivero from talking to the mayor on October 11. Mayor Clark reiterated that it was Judge Hastings who had warned him to stay away from Gordon. The information from the other interviews also corroborated the earlier evidence.[241]

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[239] 1180-1185; HXs. 193a-b.

[240] 1185; HXs. 194a-b.

At this time, Mayor Clark consented to wear a body recorder and tape a conversation with Judge Hastings. Upon further reflection, however, because of concerns about his health, he changed his mind. He did, however, testify in the grand jury, and his statement there was consistent with his earlier recollections of the discussion with Judge Hastings.[242]

Thereafter, the FBI interviewed three people who were listed on the program of the September 6 conference at the Hyatt Regency Hotel. These interviews confirmed that Mayor Clark was present at the conference at which Judge Hastings had given a speech. There were conflicts among those interviewed as to the time and length of that speech. Further interviews were not conducted, however, to protect Judge Hastings and Mayor Clark from rumors spreading in the community.[243]

Subsequently, the Department of Justice decided to attempt to interview Judge Hastings. On May 19, 1986, FBI Special Agent Christopher Mazzella spoke to Judge Hastings about this matter.[244] Mazzella told Judge Hastings that the Public Integrity Section of the Department of Justice had asked him to contact the judge in order to set up an appointment to discuss the matter addressed in a March Miami Herald article, which pertained to the disclosure to Mayor Clark of information related to a wiretap supervised by Judge Hastings. Mazzella advised the judge that he was the supervisor of the wiretap case agent, Geoffrey Santini.[245]

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[241] 1186-87.

[242] 1186-87.

[243] 1187-88.

[244] Judge Hastings had his court reporter listen to and transcribe the conversation. 1189-90; HX. 223.

Judge Hastings told Special Agent Mazzella that inasmuch as the subject pertained to a Title III matter, it would be unlawful for him to discuss the matter with Mazzella, a contention he repeated before the Impeachment Trial Committee. However, as the supervising agent of the investigation that was the subject of the wiretap, Mazzella had participated in the preparation of the affidavit and other documents presented to Judge Hastings, and he was privy to all the information gleaned from that wiretap. There was no legal reason why Judge Hastings could not discuss the wiretap with Special Agent Mazzella. Moreover, Mazzella was calling to discuss the leak of information, not the contents of the wiretap documents themselves.[246]

In the May 19, 1986 call, Judge Hastings told Mazzella that he would, however, talk with representatives of the Public Integrity Section. But when Eric Holder of that section called Judge Hastings the following day, the judge declined to be interviewed, stating that Holder would have to do whatever he planned to do without Judge Hastings' assistance, and that he [Hastings] knew how the Department of Justice worked.[247]

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[245] 1189-91; HX. 223.

[246] 1191-92, 1298-99; HX. 223.

8. The Costs of Disclosure

The few words uttered by Judge Hastings to Mayor Clark in a chance meeting at a downtown Miami hotel were to have an expensive and lasting impact on Federal law enforcement efforts to combat South Florida's most intractable areas of crime. Some of those costs were calculable -- extensive manpower and other resources had been committed to the union investigation for over a year, and nearly as long in the Hialeah case. The cost of the wiretap alone was in excess of $300,000.[248]

Equally costly, however, was the chilling effect on the FBI's ability to develop informants and cooperating witnesses. This was true not only in the abstract, but also with respect to specific persons who previously had provided invaluable help. In the union investigation, at the time of the leak, the FBI's effort to get Rivero into the union was about to be assisted by another informant, a high level official of the International Longshoreman's Association, who had agreed to vouch for Rivero. After learning of the leak, Special Agents Mazzella and Santini advised the ILA informant that the investigation might be compromised, and then gave him the option of going forward with the vouching. Understandably, the informant decided he wanted no part of the effort.[249]

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[247] 1301-02; HX. 223; S.378.

[248] 1175-78.

The leak also meant lost opportunities. Not only was the union investigation lost, so, too, was the investigation of local corrupt zoning practices in Hialeah. In the North Bay Village investigation, arrests were eventually made, but because of the need to investigate the leak, it was terminated prematurely. The FBI was prevented from using the undercover scenario to expand the investigation into related areas of police corruption.[250]

The disclosure also created a perhaps irremediable breach of trust within the criminal justice system. The most immediate evidence of this was the fact that the U.S. Attorney's Office in Miami was forced to submit false progress reports to Judge Hastings pending the leak investigation, with the full reports being submitted to the Chief Judge of the court. Former Assistant U.S. Attorney Martinez described the sense of betrayal he now feels in his dealing with Judge Hastings, going so far as to say that he believes that the respondent's continued presence on the bench is dangerous. This belief apparently was shared, for after the leak, no political corruption matters, wiretaps, or in camera submissions of sensitive matters were presented to Judge Hastings, so far as Martinez was aware. Special Agent Santini echoed this concern when he testified that because his oath of office and conscience preclude him from placing undercover agents and informants into dangerous situations, he would no longer present applications for wiretaps to Judge Hastings.[251]

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[249] Id.

[250] 1177-78.

B. ARGUMENT: ARTICLE XVI

> **From July 15, 1985, to September 15, 1985, Judge Hastings was the supervising judge of a wiretap instituted under chapter 119 of title 18, United States Code (added by title III of the Omnibus Crime Control and Safe Streets Act of 1968). The wiretap was part of certain investigations then being conducted by law enforcement agents of the United States.**
>
> **As supervising judge, Judge Hastings learned highly confidential information obtained through the wiretap. The documents disclosing this information, presented to Judge Hastings as the supervising judge, were Judge Hastings' sole source of the highly confidential information.**
>
> **On September 6, 1985, Judge Hastings revealed highly confidential information that he learned as the supervising judge of the wiretap, as follows: On the morning of September 6, 1985, Judge Hastings told Stephen Clark, the Mayor of Dade County, Florida, to stay away from Kevin "Waxy" Gordon, who was "hot" and was using the Mayor's name in Hialeah, Florida.**
>
> **As a result of this improper disclosure, certain investigations then being conducted by law enforcement agents of the United States were thwarted and ultimately terminated.**
>
> **Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.**

There is no question that Mayor Clark was given information about an ongoing undercover investigation, which involved a Federal wiretap supervised by Judge Hastings. The only issue is whether the mayor, who has repeatedly stated that his source was the judge himself, is to be believed.

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[251] 1046-47, 1061, 1069, 1105-06.

It is the circumstantial evidence supporting the mayor's accusation that compels the conclusion that Judge Hastings is guilty of the charge contained in Article XVI, not only because most of this damning evidence is undisputed, but also because no other explanation is plausible.

1. Undisputed Facts Corroborate Mayor Clark's Identification of Judge Hastings as His Source.

The evidence overwhelmingly establishes Judge Hastings' guilt with respect to Article XVI, particularly in light of the wealth of undisputed facts that corroborates Mayor Clark's testimony. There is no disagreement that Judge Hastings and Mayor Clark had the opportunity to discuss the matter on the morning of the September 6 conference, as alleged by Mayor Clark. It is also undisputed that as a result of his role as the supervisor of the wiretap, Judge Hastings was one of a very limited number of persons who had been provided with the information that Mayor Clark later repeated to Kevin "Waxy" Gordon. More significantly, Judge Hastings concedes that in his discussions with Assistant U.S. Attorney Martinez and Special Agent Santini, he focused on and discussed the precise facts that were relayed to Mayor Clark -- that Gordon was "hot," i.e. under investigation, that Gordon was using the mayor's name, and that this was occurring in Hialeah. The fact that it was precisely these matters, and no others, that Judge Hastings focused on in his discussions with Federal investigators is no mere coincidence. Indeed, it was Judge

Hastings, not Martinez and Santini, who brought up the mayor's name in their discussions of the wiretap reports.

Thus, just a little over a week after Judge Hastings told Martinez that "Clark better be careful because he could get in trouble hanging around Waxy," Clark was told not to hang around Waxy. Two weeks before that, Judge Hastings told Santini that if Waxy "didn't keep his mouth shut, he was going to get everyone into trouble, including the mayor." In the report of September 5, the report that would be most fresh in Judge Hastings' mind at the time of his encounter with Mayor Clark on September 6, Waxy claimed that he could influence zoning decisions in Hialeah through Mayor Clark. Thus, Judge Hastings prediction had come true -- Gordon was talking too much, getting the mayor into trouble, perhaps unfairly. Through some misguided logic, Judge Hastings apparently thought it was his obligation to do something more than complain to the investigators about the mayor's predicament.[252]

Further support for Mayor Clark's version of the events is that immediately after the September 6 meeting at the Hyatt Regency, the undercover operations fell apart. This, too, is undisputed. Gordon immediately began to suspect that undercover agents were in their midst, as indeed they were. This contrasted sharply with the success previously obtained in the undercover operation. Prior to September 6, 1985, there had been no indication that confidential information from the wiretap or the investigation had been disclosed. In fact, the indications were to the contrary: the wiretap had been extremely productive and additional crimes in many areas were being discovered.

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[252] 1040-41, 1043-44, 1083-85, 1090-93, 1282-83, 1289-92; HXs. 160-83, 180.

Finally, it is undisputed that Mayor Clark has never had a motive to harm Judge Hastings. The mayor's lack of motive is evident not only from the fortuitous manner in which his accusation became known, but also from the absence of animus between the men. In fact, they barely knew each other. Even Judge Hastings could not speculate as to why Mayor Clark would falsely accuse him.[253]

2. No Other Explanation is Plausible

Perhaps the most persuasive corroborating factor, however, is that given these undisputed facts, no other explanation makes sense. To believe that Judge Hastings is not the source of the leak, one must not only believe that Mayor Clark was lying, but also that either a bizarre and complicated series of coincidences or a deliberate plot occurred. That is, it is not sufficient to merely speculate as to who besides Judge Hastings had access to the wiretap reports. A plausible alternative explanation must also take into account the timing and consequences of the leak, and its particular content. In short, Judge Hastings' attempt to question Mayor Clark's account is only smoke.

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[253] 1123, 1284-85, 1292-93.

a. The Dramatic Change in the Course of the Underlying Investigation Dates from September

An alternate explanation would first have to explain why and how Mayor Clark's repetition of the disclosure to Kevin "Waxy" Gordon came to coincide with Mayor Clark's meeting Judge Hastings, an event that the judge agrees was a rarity. If the mayor's source was not the judge, that source would have had to tell Mayor Clark that Judge Hastings was the supervising judge of the wiretap. Otherwise, Mayor Clark's blaming the leak on the judge would carry no weight. Then Mayor Clark would have to see Judge Hastings. Given the fact that no change in the behavior of the targets occurred until September 6, Mayor Clark would have had to sit on the information until the day when he knew he was going to see the judge. Such a course of events is not merely highly unlikely, it defies common sense.

b. No Other Potential Source Had Access to All the Information

Not withstanding the above, Judge Hastings suggests that Mayor Clark obtained the warning from someone else. Although the judge did not argue in support of a particular alternative, several theories were suggested or implied through the evidence which he presented to the Impeachment Trial Committee. All of them are implausible. None undermines the conclusion that Judge Hastings disclosed the confidential information.

(1) The Golfing Connection

Judge Hastings' most favored theory seems to be that because Mayor Clark played golf on a regular basis with a foursome that included two FBI agents, someone in the bureau was his source. An additional fact was presented in support of this theory: on July 23, 1985, about a week after the wiretap was approved, the fourth member of the golfing group, Glen Whittle, called the FBI and asked if the mayor and Peter Ferguson were under investigation. In this call, Whittle claimed as his source yet another golfing acquaintance of Clark's, H. Paul Rico, the former FBI agent who had impersonated Frank Romano in the bribery conspiracy investigation.[234]

While these coincidences invite speculation, if not suspicion about the mayor's veracity, other evidence quickly lays this concern to rest. First, the mayor was not under investigation, nor was his colleague, Peter Ferguson. Therefore, there was nothing for the FBI agents to disclose. Indeed, in July, 1985, the only mention of Clark in the wiretap reports was innocuous, that Ferguson had been his campaign manager.[255] More importantly, if there was a leak in July, as Judge Hastings seems to contend, it is inconceivable that Mayor Clark would ignore the warning to stay away from Gordon and agree a month later to Gordon's request that he assist Gino with respect to a zoning matter in Hialeah. The progress of the undercover investigations belie a July disclosure.[256]

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[234] 1318-19.

[255] 1194.

Moreover, even if the alleged FBI leak had nothing to do with the July 23 inquiry, it had to have occurred sometime after August 22, for one can hardly assume that the mayor would intentionally implicate himself just to bide his time to blame Judge Hastings for the leak. However, none of the agents who golfed with Mayor Clark were even working on the underlying investigation and, indeed, by the end of August, the mayor was not even playing golf with his FBI friends.[257] Finally, it is highly unlikely that FBI agents and former agents would compromise ongoing investigations, and place undercover operatives and their fellow agents in mortal danger.

(2) Unexplored options

Judge Hastings further suggests that he should be acquitted on Article XVI because the FBI and Department of Justice focused their attention exclusively on trying to establish whether he was the source, rather than exploring other possibilities. By implication, for example, the judge suggests that perhaps a telephone company employee knowledgeable about wiretaps or an agent monitoring the wiretap learned the information and disclosed it.

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[256] On August 22, 1985, Rivero was introduced by Gordon to Mayor Clark, and after a private discussion between Gordon and Clark, the latter offered to take care of the Hialeah matter through his contact, Silvio Cardosa. This, of course, was precisely the kind of action that a forewarned person would avoid.

[257] Then Special Agent Anthony Amoroso was advised in August that Mayor Clark's name had come up in an investigation, and therefore, he should forgo playing golf with him, which he did, as did the second agent. 1355.

All of this is mere speculation. A review of the progress reports indicates that the information pertaining to Mayor Clark came primarily from meetings Rivero had with Gordon, not from the wiretap itself, so that eavesdropping on the wiretap would not be sufficiently enlightening. Could the source have been a clerk who typed or filed the confidential reports as further speculated by Judge Hastings? No, for the mayor knew no one in the courthouse, nor is there any evidence that any employee made such a disclosure. Could the participants in those discussions, Martinez and Santini, have leaked the information, intentionally or inadvertently? To assume this is possible, one must assume that either the Assistant U.S. Attorney or the FBI case agent would not only repeat his conversations with the judge to others, but also would jeopardize the safety of their own informants and FBI undercover colleagues, and destroy months, if not years of their own efforts.[258]

The House submits that pursuing such inquiries would have been nothing more than boxing at shadows and might very well have endangered the only plausible lead the investigators had. In any event, however, the issue for the Senate is not whether more could have been done, but whether the evidence against Judge Hastings is sufficient.

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[258] HXs. 160-83.

3. Possible Factual Errors in Mayor Clark's Account do not Undermine his Credibility

Mayor Clark has repeatedly and unequivocally stated that Judge Hastings was his source; he has had no apparent motive to fabricate this allegation; and the timing and circumstances of the leak and the history of the underlying investigation all suggest there is no plausible alternative source of the information. The sole grounds upon which Judge Hastings has staked his attack on the mayor's credibility derives from the fact that Mayor Clark recalls the discussion with the judge as having occurred after the judge delivered his speech, not before.

The House does not dispute that there is evidence in the record that challenges Mayor Clark's recollection of the timing of the disclosure, including the fact that the call to Gordon setting up the meeting with the mayor was intercepted at 8:58 a.m., whereas the program indicated that Judge Hastings' speech was not to begin until after 9:05 a.m. Assuming that the program did not begin early, does the fact that the mayor is mistaken with respect to this aspect of his recollection mean that he fabricated the whole thing? The answer is no.[259]

First, as Special Agent Mazzella testified, witnesses get the sequence of events mixed up all the time. Indeed, one of the respondent's own witnesses did just that: in the bribery/false testimony part of the impeachment trial, Margaret Dabreau Owens testified that William Borders joined the group at the Sheraton

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[259] HX. 189.

Hotel on September 12, 1981, after they were already in the restaurant, a version of events at odds with every other witness, including Judge Hastings. Just as there is no reason to believe that this error suggests that Mrs. Owens is lying about the more important fact that Borders appeared by the Sheraton that night, there is no reason to assume that Mayor Clark fabricated his account of the disclosure by Judge Hastings.[260]

Second, Mayor Clark was not called upon to remember the precise circumstances of the September 6 discussion until he was interviewed by the FBI on February 27, 1986, over five months later. By that time, he recalled the warning coming after the judge had given his speech, but references in the surreptitiously recorded conversation of January 17, 1986, suggest that at an earlier time, he may have recalled the circumstances somewhat differently. In that taped discussion, Mayor Clark says to Gordon that the discussion took place as people were greeting each other: "And everybody's saying 'hello judge' and he comes and says Stevie I want to tell you something . . ." This suggests that the warning came at the start of the conference, when both Monsignor Walsh and Judge Hastings recall them being together. If so, the timing coincides precisely with the call Ferguson made to Gordon setting up the meeting later that morning.[261]

Mayor Clark has no recollection of being with Monsignor Walsh and Judge Hastings prior to the start of the conference. Rather than suggest fabrication, however, this mistake bolsters the conclusion that the mistake as to the sequence of events arises from his having a generally dim recollection of most of the events of that morning other than the critical facts, not surprising for a older man in poor health, who attends hundreds of similar meetings every year. With respect to the critical fact -- that Judge Hastings warned him that morning about Gordon -- Clark has been entirely consistent, in both public and private accounts, at times when his veracity has been challenged and at times when he had no reason to believe he would be overheard. It is that consistency which is the true test of his accuracy and credibility.[262]

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[260] 1188, 1404, 1414.

[261] HX. 194b.

4. The Intentional Unauthorized Disclosure of Confidential Information by a Federal Judge is an Impeachable Offense

Finally, it has been suggested by a member of the Impeachment Committee that even if Judge Hastings did disclose this information, the action does not rise to the level of an impeachable offense.[263] The House vigorously rejects this position. Indeed, Judge Hastings himself argued this point:

> . . . I believe that the breaching of confidential aspects of wiretaps or anything else that is confidential in the courts should rise to the level of an impeachable offense. I believe that judicial accountability ought to be always on the table and judges should be circumspect and above reproach, and I believe that that is an important facet in a person being a United States District Court judge, and if he or she can't function

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[262] 1131, 1133.

[263] 1261-62.

> along those lines, not only if they breach those confidences should they be impeached, I believe they ought to be railed into a posture of ignominy in their respective communities.[264]

In this case, the breach of trust was not only a violation of Judge Hastings' oath of office, but it was in reckless and callous disregard of the lives of innocent people. The fact that any leak in these investigations could be life-threatening to the undercover informant and agents and could alert the subjects to the probe was implicit, if not explicit, in the materials submitted to Judge Hastings. For example, the initial wiretap application and supporting affidavit had noted that some of the targets were both suspicious of outsiders, and potentially dangerous. The police in North Bay Village, suspected of corruption, were armed and in a position to claim that any shooting in connection with the narcotics undercover scenario was part of a lawful arrest. The personal backgrounds of some of the subjects and an earlier successful investigation of corruption in the union also explained their suspicions of outsiders and their potential for violence. One target was identified as the son of a leading organized crime figure and the union member controlling "bookmaking, shylocking and fencing" operations at the Port of Miami; a second was the secretary-treasurer of Local 1922 and son of the former office manager of Local 1922 who had been convicted of racketeering, racketeering conspiracy, extortion, and Taft-Hartley Act violations; another described himself as a member of "La Cosa

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[264] 1316.

Nostra." The suspicious attitude of the targets of the investigation was graphically illustrated to Judge Hastings by the report that Rivero had been patted down for recording equipment several times, including once by an organized crime figure whom the FBI intended as the recipient of the payoff to obtain Rivero's union admission. This pat-down had occurred in the presence of police from North Bay Village.[265]

Thus, based on the information contained in the reports, there could have been no question in Judge Hastings' mind that this was an operation fraught with danger, where the need for secrecy was paramount. That the judge would ignore these warnings, and casually pass along enough of the secret information to alert the suspects, compounds his misconduct. Why he did this is not known. Neither money nor friendship seems to have played a part. Others have speculated that the disclosure arose out of feelings of distrust of the same investigative process that had previously prosecuted him, or from a desire to do a favor for a fellow politician that might someday be repaid in kind. But whatever the motive, it is clear that by this act, the breach of faith by Judge Hastings is complete and irreversible, rendering him unfit for the office he has disgraced.[266]

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[265] 1027, 1094-95; HXs. 160-61.

[266] 1079-80, 1231-32.

PART THREE

ARTICLE XVII

> Judge Hastings, who as a Federal judge is required to enforce and obey the Constitution and laws of the United States, to uphold the integrity of the judiciary, to avoid impropriety and the appearance of impropriety, and to perform the duties of his office impartially, did, through --
>
> (1) a corrupt relationship with William Borders of Washington, D.C.;
> (2) repeated false testimony under oath at Judge Hastings' criminal trial;
> (3) fabrication of false documents which were submitted as evidence at this criminal trial; and
> (4) improper disclosure of confidential information
>
> acquired by him as supervisory judge of a wiretap; undermine confidence in the integrity and impartiality of the judiciary and betray the trust of the people of the United States, thereby bringing disrepute on the Federal courts and the administration of justice by the Federal courts.
>
> Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

The final Article of Impeachment is the so-called "omnibus" article. The totality of Judge Hastings' conduct -- his corrupt relationship with William Borders, his repeated false testimony at his criminal trial, his fabrication of evidence at his criminal trial, and his disclosure of confidential wiretap information -- demands that he be removed from the Federal bench.

Article XVII rests on the same evidence adduced in support of Articles I through XVI. Judge Hastings' misconduct, starting in 1981, continuing in 1983 and repeating in 1985, has been proved by overwhelming evidence. Conviction on Article XVII, however, rests on a separate legal theory, which has roots deeply imbedded in the Senate's impeachment power.

An article of impeachment that asserts a pattern of misconduct, rather than just one corrupt act, allows the Senate to consider the totality of a Federal officer's behavior and its impact on the body politic. A Senator may believe that removal from office is required not only for the commission of a single offense, but also because of the impact of continued misdeeds on the Federal judiciary. Or, a Senator may believe that the separate acts standing alone do not justify removal from office, but all the misdeeds taken together justify conviction.

In every impeachment trial in the 20th century that resulted in conviction, the Senate has voted for an article that included several acts of misconduct, including acts that were separately alleged in other articles. The Senate has therefore recognized that an omnibus article is a separate and important basis for removing a corrupt official from public office in an impeachment proceeding.[267]

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[267] In the impeachment of Judge Robert W. Archbald, the Senate found Judge Archbald guilty of the charges in five of thirteen Articles of Impeachment, including the catch-all thirteenth. Cong. Rec. 62nd Cong., 3d Sess., January 13, 1913, at S1627-47.

In the impeachment of Judge Halsted Ritter, all of his acts of misconduct were pleaded in the final article of impeachment primarily by cross-reference to the preceding articles. The Senate acquitted Judge Ritter on each of the first six articles, but found him guilty of the omnibus article. Cong. Rec., 74th Cong., 1st Sess. March 31, 1936 at S637-38.

Most recently, in the impeachment of Judge Harry Claiborne, the Senate convicted Judge Claiborne on Article IV, the omnibus article, as well as on the articles that separately alleged the

In this case, Judge Hastings has engaged in a course of conduct indicating that he believed he was above the law. In 1981, the judge put justice up for sale, by participating in a corrupt conspiracy to obtain a bribe from criminal defendants appearing before him. In 1983, when confronted with his crime, he repeatedly lied under oath to escape punishment. One month prior to his criminal trial, Judge Hastings produced fabricated evidence -- the "letters for Hemp" referred to in the October 5, 1981 recorded conversation -- which he presented to the jury. And, in 1985, Judge Hastings undermined ongoing and dangerous law enforcement investigations by disclosing confidential information which he was privy to solely because of his position as a Federal judge.

Through these actions, Judge Hastings has not only tarnished his personal reputation as a member of the Federal judiciary, but he has also brought his court and the entire Federal judiciary into disrepute. Judge Hastings' conduct undermined the integrity and impartiality of the Judicial Branch of our Government. To restore that integrity and to protect the American public, the Senate should convict Judge Hastings on Article XVII.

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individual acts of misconduct. Proceedings of the United States Senate, 99th Cong., 2d Sess., S. Doc. 99-48, 1986, at 291-98.

PART FOUR

ADEQUACY OF THE RECORD

As part of his defense to the charges related to the Romano bribery scheme, Judge Hastings complains that the record is incomplete, naming witnesses who have either died or are no longer competent to testify, and citing records which are no longer available. These arguments are simply smoke. The judge is attempting to cloud the true issue of his role as Borders' co-conspirator in the bribery scheme.

What Judge Hastings ignores in his argument that it is somehow inequitable for the Senate to consider the Articles of Impeachment on the current record is that this issue has already been resolved by the Senate. In a nearly unanimous vote of 97 - 1, the Senate rejected Judge Hastings' motion to dismiss Articles I through XV of the Articles of Impeachment. One of the two grounds put forth by respondent in that motion was that the delay between the time of the offenses and time of the impeachment proceedings was so great and the impact of that delay was so prejudicial, that trial on these matters should be precluded. Judge Hastings' position had no support in the law and was soundly rejected by the Senate.

The defense of unwarranted delay does not apply to the Federal government in a suit to enforce a public right or protect the public interest because the public interest -- in this case the integrity of the Federal judiciary -- is preeminent. Even if there were a factual basis for arguing unreasonable delay, relief on those grounds would be precluded in an impeachment proceeding. In this case, however, there is no factual basis for respondent's complaint. Judge Hastings' impeachment falls well within the bounds of precedent in prior impeachments.[268] Such delay as there was in the adoption of the Articles of Impeachment in this matter was not the result of unreasonable or inexcusable delay by the House. To the contrary, much of the time lapse stemmed from litigation initiated by respondent or engendered by his opposition to the disclosure of grand jury and other documents. The Senate, therefore, correctly rejected Judge Hastings proposition that a Senate impeachment trial was barred on equitable grounds.[269]

The House presumes, therefore, that Judge Hastings is arguing that even though prosecution in the Senate is not barred because of the passage of time, the record is so incomplete that it is impossible for the Senate to reach a fair and true verdict in this matter. This proposition is unsupported. To the extent that there is harm resulting from unavailable records or dimmed recollections, both parties are hampered in their presentation of the case. The testimony relating to the period of the conspiracy from March, 1981 to September 10, 1981, for example, has not been preserved for either party.[270] More importantly, in spite of respondent's freewheeling speculations about the facts which might be proved by the "missing evidence," even the "missing evidence" could not explain away the damning evidence of Judge Hastings' complicity. What missing witness could explain Judge Hastings' conduct at the Fontainebleau on the night of September 16, or account for the hurried issuance of the October 6 forfeiture order shortly after it was promised by Borders, or interpret the coded conversation between Judge Hastings and Borders on October 5, 1981? What unavailable records or witnesses can make sense of Judge Hastings' bizarre pay phone to pay phone call on April 9, or explain Borders' detailed knowledge of the forfeiture matter, or justify Judge Hastings' irrational flight from Washington via BWI on October 9?

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[268] In the American experience, there have been at least three impeachment proceedings in which the time between the charged offenses and the adoption of articles was the same or greater that the seven years at issue in this case. In the impeachment of Judge Charles Swayne, two of the six articles alleged offenses that occurred more than twelve years prior to the impeachment. See, Impeachment of Charles Swayne, Proceedings in the House of Representatives (1903-1905), 66th Cong., 2nd. Sess. 635 (1912). Similarly, in the impeachment of Judge Halsted Ritter, the alleged offenses occurred five to seven years prior to the adoption of articles, and in the recent impeachment of Judge Harry Claiborne, the offense alleged in one of the articles occurred six years before the article was adopted by the House. See, Official Conduct of Judge Halsted L. Ritter, Trial and Impeachment, 1933-36 at 628; S. Doc 99-48, 99th Cong. 2d Sess. at 2 (1986).

[269] For a full discussion of this issue, see Response of the House of Representatives to Respondent's Motion to Dismiss Articles I through XV, S. Doc. 101-4, 101st Cong. 1st Sess. (1989) at 33 - 44.

The House submits that the conjecture as to what witnesses might have testified to or records might have shown cannot satisfactorily explain the overwhelming incriminating evidence that Judge Hastings is guilty as charged of conspiring with William Borders to sell his office. For example, Judge Hastings suggests that the testimony of Joseph Nesline and the Romano brothers would have shed light on the sources from whom Borders might have gained the "insider" information he had about the Romano forfeiture order. But the information that Nesline could have obtained from the Romanos would not have provided the details that William Borders knew. For example, the Romanos could not know the timing or amount of the forfeiture reversal, issued on October 6, 1981. That information would have to had come from a select few members of Judge Hastings' staff, all of whom deny any such disclosure (which Judge Hastings does not dispute). Further, why would Borders offer the forfeiture orders as proof of his control of the judge if he was receiving the information, through Nesline, from the Romanos, the very targets of his bribery scheme? Likewise, the missing telephone records for Hemphill Pride, Joseph Nesline and William Borders could do no more than provide additional contacts between persons who were admittedly in communication with each other.

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[270] Similarly, in response to Judge Hastings' explanation, made for the first time before the Impeachment Trial Committee, that his call on October 12 was made at the behest of his mother to the mother of William Borders, the House might speculate that Alberta Borders, like Mildred Hastings, had a separate telephone of her own. There are no telephone records, however, to conclusively determine that fact.

Accordingly, the House of Representatives submits that the record before the Senate is more than adequate upon which to base the conviction of Judge Hastings on each of the Articles of Impeachment.

PART FIVE

STANDARD OF PROOF AND IMPACT OF THE JURY VERDICT

Article I, Section 3 of the Constitution vests the Senate with the sole power of removing an impeached Federal official from public office. The exercise of this unique constitutional responsibility, in essence, involves a three step process. First, each Senator must determine the appropriate standard of proof to apply in an impeachment proceeding. Second, each Senator must evaluate all the evidence in light of this standard to determine whether the impeached official is guilty as charged. Third, if it is concluded that the respondent committed the misconduct, then the remaining issue is whether that conduct rises to the level of an impeachable offense.

Senate precedent as well as the nature and purpose of impeachment dictate that a civil rather than criminal standard of proof applies in this and any impeachment case. Judge Hastings' reliance on the criminal standard of beyond a reasonable doubt has absolutely no historical support. Moreover, it is inconsistent with the very function of impeachment in our constitutional Government.

In 1986, the Senate overwhelmingly rejected Judge Harry Claiborne's motion to designate beyond a reasonable doubt as the standard of proof in impeachment proceedings.[271] In doing so, the Senate established that it is up to each Senator to determine the standard of proof to be applied to the evidence.[272] For example, each Senator does not have to be convinced that the evidence establishes beyond a reasonable doubt that Judge Hastings participated in the conspiracy with William Borders. The Senators may differ in their conclusions as to what standard of proof is appropriate.

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[271] 132 Cong. Rec. S15507 (daily ed., October 6, 1986). The vote was 75 to 17.

[272] 132 Cong. Rec. S15506 (daily ed., October 7, 1986).

Today, reliance on a civil standard rests on even stronger precedent. In this very case, the Senate determined that impeachment is not a criminal proceeding. By rejecting Judge Hastings' motion that the doctrine of double jeopardy barred this case from going forward, the Senate recognized that impeachment is remedial rather than criminal in nature. It is an independent proceeding serving a fundamentally different purpose than criminal prosecution. By making this decision, by a vote of 97 to 1, the Senate established that impeachment is a civil proceeding.

Therefore, when taking the first step toward resolving this case, each Senator should choose a civil standard of proof. The House submits that the appropriate standard is preponderance of the evidence. If, on any Article of Impeachment, a preponderance of the evidence establishes Judge Hastings' guilt, then conviction is warranted.

What does "preponderance of the evidence" mean? Simply put, if the evidence establishes that it is more likely than not that Judge Hastings engaged in the misconduct as charged, a guilty vote should follow.[273] Put another way, when weighing the opposing evidence, if a Senator finds that the scale on the side of guilt is at all heavier than the scale on the side of innocence, the Senate should find Judge Hastings guilty as charged.

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[273] Devitt and Blackmar, Federal Jury Practice and Instructions (1977), section 71.14.

The House submits that preponderance of the evidence is the appropriate standard of proof in this or any other impeachment proceeding. If, however, a Senator wants to employ a higher standard, at most that of clear and convincing evidence should be the choice. This, too, is a civil standard, consistent with the nature and purpose of impeachment. If the evidence clearly and convincingly establishes Judge Hastings' guilt on any one Article of Impeachment, he should be removed from office. The House submits that the evidence easily satisfies this higher standard of proof on all 17 Articles of Impeachment.

Implicit in any civil standard is the fact that proof to an absolute certainty is not required. Indeed, proof to an absolute certainty is seldom possible in any case. In this impeachment proceeding, a Senator should vote for conviction if, after consideration of all the evidence, he or she believes that it is more likely true than not that Judge Hastings engaged in the misconduct charged in whatever article is under consideration.

Adopting a civil standard of proof is consistent with the nature and purpose of impeachment. In an impeachment proceeding, the Constitution reserves to the Senate the task of determining whether an impeached government official should retain public office. At issue is the public's trust and confidence in the officials who constitute our government, in this case the public's trust and confidence in the Federal judiciary. The rights of the public at issue here militate against a standard of proof focusing solely on the respondent. A civil standard takes into account the

Senate's weighty responsibility and its obligation to the public to protect the integrity of our institutions of government.

Moreover, the Constitution provides other safeguards to the impeached official, which in turn support a civil standard of proof. Impeachment requires the separate action of each House of Congress. As noted by Alexander Hamilton, the assignment of "the right of accusing" to one House and of "the right of judging" to the other "guards against the danger of persecution from the prevalency of a factious spirit in either of those branches."[274] In addition, "no Person shall be convicted [in the Senate] without the concurrence of two-thirds of the Members present."[275] Alexander Hamilton again emphasized the protection that this provision offers to the impeached official:

> As the concurrence of two-thirds of the Senate will be requisite to a condemnation, the security to innocence, from this additional circumstance, will be as complete as itself can desire.[276]

In light of these safeguards, there is no reason for a Senator to adopt a standard of proof that would fail to provide sufficient protection to the public interest in the removal of a corrupt Federal judge.

Finally, it must be emphasized that Judge Hastings' acquittal in his criminal case in no way alters the conclusion that a civil standard of proof should be used in this proceeding. To acknowledge the jury verdict by raising the standard to beyond a reasonable doubt undermines the Senate's determination that impeachment is an independent remedial proceeding. Moreover, raising the standard of proof based on the jury verdict mixes apples with oranges. A decision as to what standard applies in an impeachment case should depend upon the nature of impeachment, not upon any prior judicial proceeding. For example, the Supreme Court has consistently held that a civil proceeding can follow a criminal case that was based upon the same facts.[277] No matter what the outcome of the earlier criminal case, in the subsequent civil proceeding, a civil standard of proof, not beyond a reasonable doubt, applies.

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[274] The Federalist, No. 66 at 484 (Franklin Lib. ed.).

[275] Article I, section 3.

[276] The Federalist, No. 66 at 484 (Franklin Lib. Ed.).

It is the position of the House of Representatives that Judge Hastings' acquittal is, in fact, of no consequence in this case. In an impeachment, both the House and Senate have a unique constitutional responsibility. To defer to a jury verdict in effect places in the hands of the Judicial Branch what is clearly a legislative function. Moreover, in this case, to defer to the acquittal would be tantamount to accepting a jury verdict obtained by fraud.

At most, Judge Hastings' acquittal should be one of several factors weighed by the Senate when exercising its constitutional responsibility. The House submits that even if a Senator puts the verdict into the equation, the evidence is nonetheless overwhelming that Judge Hastings participated with William Borders in a conspiracy to obtain a bribe. Judge Hastings is guilty as charged.

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[277] See e.g. United States v. One Assortment of Firearms, 465 U.S. 354 (1984); Helvering v. Mitchell, 303 U.S. 391 (1938).

VI. CONCLUSION

For the foregoing reasons, the House of Representatives submits that the Senate should convict Judge Hastings on all 17 Articles of Impeachment.

Respectfully submitted,

The United States
House of Representatives

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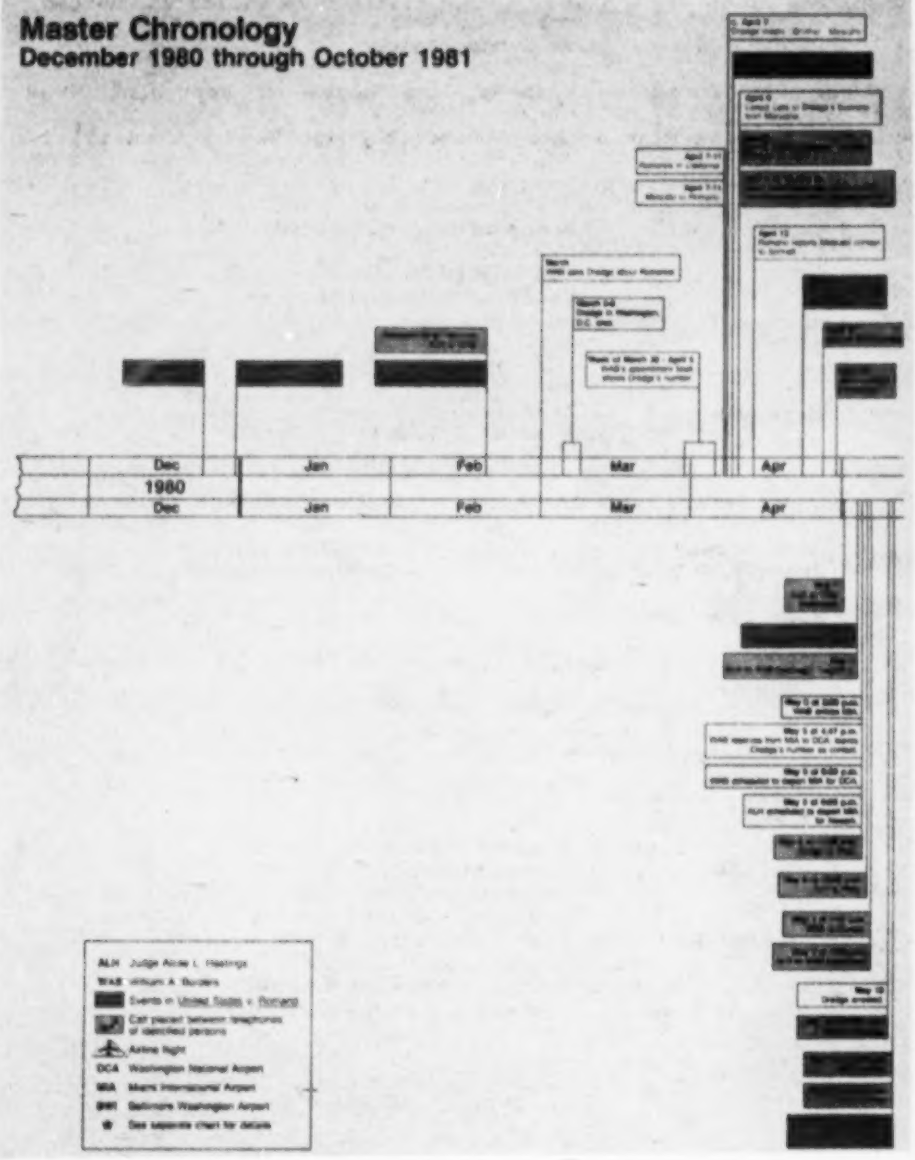
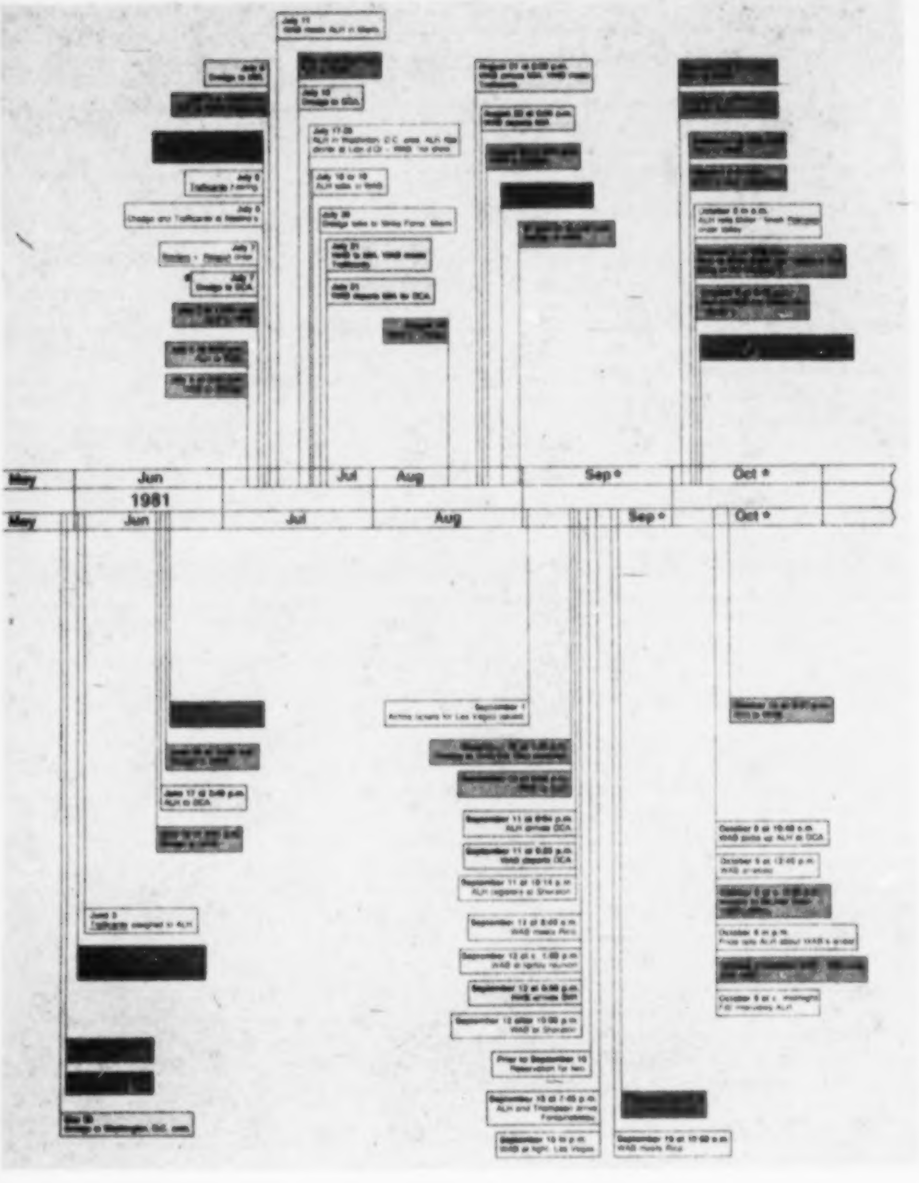
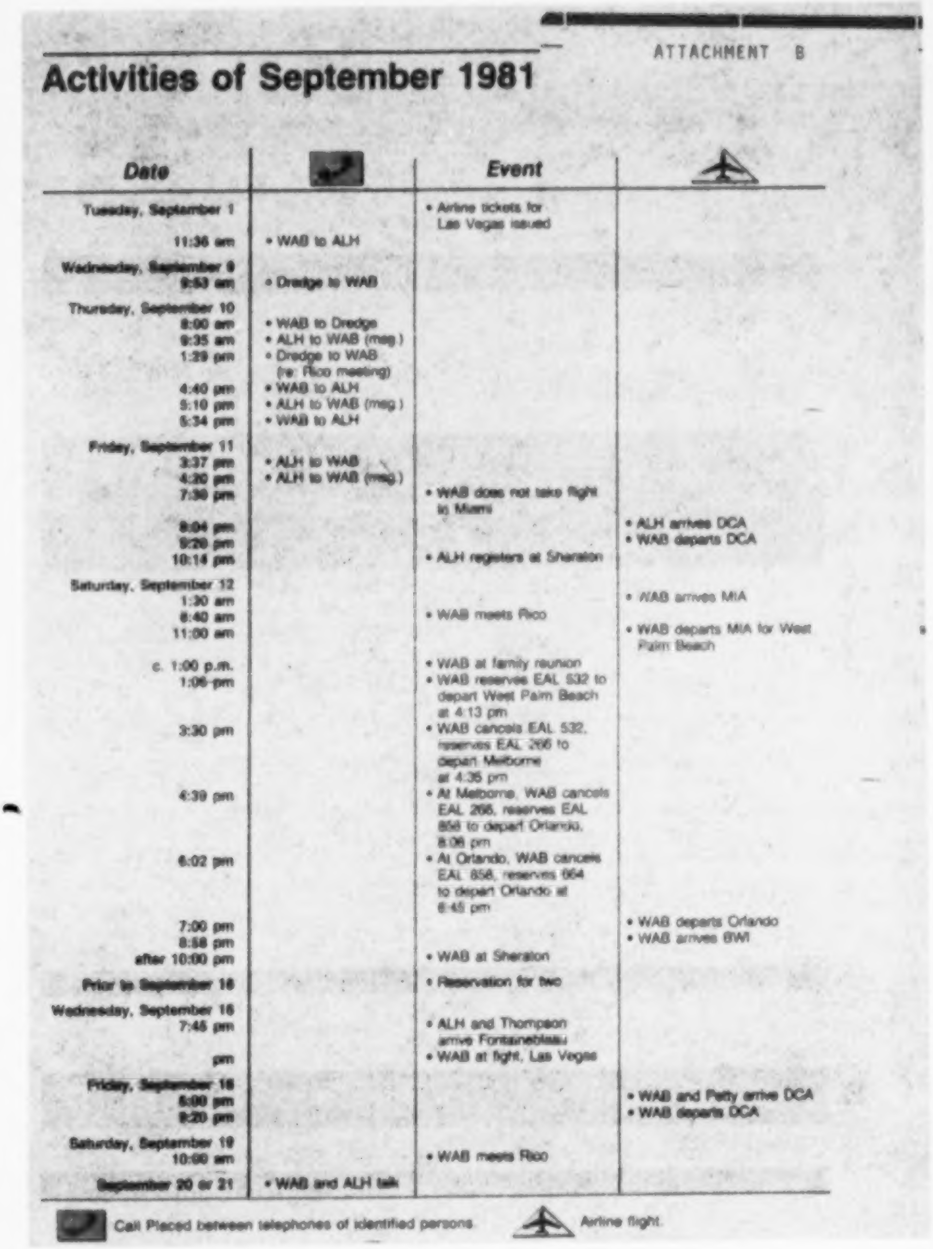
September 25, 1989

ATTACHMENT A

Master Chronology
December 1980 through October 1981




July 11
WAB meets ALH in Miami
July 6
Trafficante hearing
July 6
Dodge and Trafficante at [illegible]
July 7
Dodge to DCA
July 17-20
ALH in Washington, D.C. [illegible]
July 18 or 19
ALH talks to WAB
July 20
Dodge talks to [illegible] Miami
July 21
WAB to [illegible] WAB meets Trafficante
July 21
WAB departs MIA for DCA
August 21 at [illegible] p.m.
WAB picks up [illegible] WAB meets Trafficante
August 22 at [illegible] p.m.
WAB departs [illegible]
October 8 in a.m.
ALH tells [illegible] under [illegible]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
May
Jun
Jul
Aug
Sep
Oct
1981
May
Jun
Jul
Aug
Sep
Oct
June 17 at 3:49 p.m.
ALH to DCA
June 3
Trafficante assigned to ALH
May 28
[illegible] Washington, D.C. [illegible]
September 1
Airline tickets for Las Vegas issued
September 11 at 8:04 p.m.
ALH arrives DCA
September 11 at 9:20 p.m.
WAB departs DCA
September 11 at 10:14 p.m.
ALH registers at Sheraton
September 12 at 8:40 a.m.
WAB meets Rico
September 12 at c. 1:00 p.m.
WAB at [illegible] reunion
September 12 at 9:00 p.m.
WAB arrives [illegible]
September 12 after 10:00 p.m.
WAB at Sheraton
Prior to September 16
Reservation for two
September 15 at 7:45 p.m.
ALH and Thompson arrive Fontainebleau
September 15 in p.m.
WAB at fight, Las Vegas
September 16 at 10:00 a.m.
WAB meets Rico
October 8 at 10:40 a.m.
WAB picks up ALH at DCA
October 8 at 12:40 p.m.
WAB arrested
October 8 in p.m.
Price tells ALH about WAB's arrest
October 8 at c. midnight
FBI interviews ALH
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]



ATTACHMENT B

Activities of September 1981

Date	☎	Event	✈
Tuesday, September 1		• Airline tickets for Las Vegas issued	
11:36 am	• WAB to ALH		
Wednesday, September 9			
9:53 am	• Dredge to WAB		
Thursday, September 10			
8:00 am	• WAB to Dredge		
9:35 am	• ALH to WAB (msg.)		
1:29 pm	• Dredge to WAB (re: Rico meeting)		
4:40 pm	• WAB to ALH		
5:10 pm	• ALH to WAB (msg.)		
5:34 pm	• WAB to ALH		
Friday, September 11			
3:37 pm	• ALH to WAB		
4:20 pm	• ALH to WAB (msg.)		
7:30 pm		• WAB does not take flight to Miami	
8:04 pm			• ALH arrives DCA
9:20 pm			• WAB departs DCA
10:14 pm		• ALH registers at Sheraton	
Saturday, September 12			
1:30 am			• WAB arrives MIA
8:40 am		• WAB meets Rico	
11:00 am			• WAB departs MIA for West Palm Beach
c. 1:00 p.m.		• WAB at family reunion	
1:06-pm		• WAB reserves EAL 532 to depart West Palm Beach at 4:13 pm	
3:30 pm		• WAB cancels EAL 532, reserves EAL 266 to depart Melborne at 4:35 pm	
4:39 pm		• At Melborne, WAB cancels EAL 266, reserves EAL 858 to depart Orlando, 8:06 pm	
6:02 pm		• At Orlando, WAB cancels EAL 858, reserves 664 to depart Orlando at 6:45 pm	
7:00 pm			• WAB departs Orlando
8:58 pm			• WAB arrives BWI
after 10:00 pm		• WAB at Sheraton	
Prior to September 16		• Reservation for two	
Wednesday, September 16			
7:45 pm		• ALH and Thompson arrive Fontainebleau	
pm		• WAB at fight, Las Vegas	
Friday, September 18			
5:00 pm			• WAB and Patty arrive DCA
9:20 pm			• WAB departs DCA
Saturday, September 19			
10:00 am		• WAB meets Rico	
September 20 or 21	• WAB and ALH talk		

☎ Call Placed between telephones of identified persons. ✈ Airline flight.

ATTACHMEN. C

Activities of October 1981

Date	☎	*Event*	✈
Friday, October 2			
3:11 pm	• Rico to WAB		
4:50 pm	• WAB to ALH chambers		
Sunday, October 4			
9:38 am	• Rico to WAB		
pm	• WAB to ALH (message)		
Monday, October 5			
am		• ALH tells Miller "finish Romano order today"	
4:22 pm	• Rico to WAB (order out "today or first thing in the morning")		
5:12 pm	• ALH to WAB (re: letters for "Hemp")		
Tuesday, October 6		• Romano order mailed special delivery	
Wednesday, October 7			
12:19 pm	• Rico to WAB ("it went out yesterday")		
7:39 pm	• WAB to Rico		
Thursday, October 8			
9:37 am	• ALH to WAB		
Friday, October 9			
10:40 am			• WAB picks up ALH at DCA
am		• ALH with WAB	
11:46 am	• WAB to Rico		
12:40 pm		• WAB arrested	
c. 2:45 pm	• Murphy to Shorter from WAB's office		
c. 2:45 pm	• Shorter to Pride		
pm		• Pride tells ALH about WAB's arrest	
2:50 pm		• FBI arrives to interview ALH staff	
2:50 to 3:00 pm		• FBI arrives to interview P. Williams	
4:37 pm	• At BWI: ALH to mother		
4:43 pm	• At BWI: ALH to mother		
5:06 pm	• At BWI: ALH to P. Williams		
5:07 pm	• At BWI: P. Williams to ALH		
5:22 pm	• At BWI: P. Williams to ALH from pay phone		
5:24 pm	• At BWI: ALH to P. Williams at pay phone		
6:30 pm			• ALH scheduled to depart BWI
8:38 pm			• ALH scheduled to arrive Ft. Lauderdale
c. Midnight		• FBI interviews ALH	
Monday, October 12			
6:30 pm	• ALH to WAB		

☎ Call Placed between telephones of identified persons. ✈ Airline flight

In the
SENATE OF THE UNITED STATES
Sitting for the Trial of an Impeachment

THE HOUSE OF REPRESENTATIVES,
OF THE UNITED STATES,
plaintiff,

v.

THE HONORABLE ALCEE L. HASTINGS,
a Judge of the United States District Court
for the Southern District of Florida,
respondent.

A SUMMARY OF THE CASE FOR THE JUDGE

Four great principles are at stake in this historic case: the integrity of the judiciary; the independence of the judiciary; the presumption of innocence; and procedural due process. History will be the judge of how the Senate and the parties have measured up to these principles.

By its vote on March 16th the Senate decided that its duty to protect the integrity of the judiciary required that, when suspicion cast upon a respected Federal Judge had not been dissipated, it should hear the case on the merits, even though that same respected judge had already been acquitted by a jury on the same issues and on essentially the same evidence at a time when that evidence was fresh.

The evidence is now before the Senate. The essence of the House's case now is that, when a judge has fallen under suspicion, he should be removed if that suspicion is not dissipated, even though the judge had no control over the events giving rise to the suspicion and even when the suspicion may have been created by inadvertence, negligence, incompetence, or malice on the part of his accusers. The Senate has yet to determine its role in protecting the independence of individual judges vulnerable to such accusations. It must do so in this case.

The House contends that the standard of proof is the civil standard, a preponderance of the evidence. This is a complete misconception for several reasons: First, even in a civil proceeding, where there is a serious allegation of fraud or dishonesty, such as those present here the standard of proof is "clear and convincing".[1] Second, a case of impeachment is not *just* a civil proceeding. It is *sui generis*. What is at stake is the whole career, the honor, and the reputation of a truly remarkable man whose integrity, ability, professionalism, and humanity have been clearly demonstrated in these proceedings. What is at stake is the independence, as well as the integrity, of the judiciary. It is established that each Senator has to vote according to his or her conscience and according to the standard he or she considers required by the circumstances of this case.

We require that the evidence be "unequivocal" as well as "clear and convincing" before a resident may be removed and banished from the country.[2] Surely the standard applied in proceedings to removed and banish a judge under circumstances such as those present here can be no less. Moreover, Senators may, and in a case like this should, insist upon proof beyond reasonable doubt. The Senate has determined that impeachment proceedings are not 100% criminal proceedings. It does not follow from this, as the House mistakenly contends, that they are therefore civil proceedings for all purposes. Impeachment proceedings are *sui generis* and, as the Framers clearly saw, closely analogous to criminal proceedings in at least some respects. The Supreme Court has squarely ruled that due process may require proof beyond a reasonable doubt even in cases where due process does not require the full panoply of protections afforded the accused in a criminal case.[3] That is a standard that Senators may, and in a case like this should, insist that the evidence satisfy in every respect.

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[1] *See, e.g., Addington v. Texas,* 441 U.S. 418, 423-24 (1979) (Burger C.J.) (discussion of the function of the various standards and the factors that have governed the selections of a proper standard in various cases).

[2] *See, e.g., Woodby v. INS,* 385 U.S. 214 (1966); *cf. Addington*, 441 U.S. at 424.

This is a case, unique in the history of the common law, where the Senate has to reconsider issues that have already been determined by a jury. Having decided to re-open the issues, the Senate has to consider what weight to give to the jury's resounding acquittal. This is a case of a highly respected judge and man who, after exhaustive scrutiny of his whole life and career, stands accused only of one charge of substance, together with allegations that have been piled on, following the principle, if you sling enough mud, some may stick.

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[3] *See, e.g., In re Winship*, 397 U.S. 358 (1970) (holding that proof beyond a reasonable doubt is applicable in juvenile delinquency cases, notwithstanding their designation as civil).

This is a case in which the House asks the Senate to substitute a residue of suspicion created by the conduct of others for evidence of guilt of the kind that must be required in cases of impeachment. This is a case in which the Senate must consider its role in protecting individual judges from removal because of suspicion created by "rainmakers" or by those who might be glad, for one reason or another, to maneuver them off the bench. This is a case in which each Senator must be especially concerned to consider whether the evidence supporting the single charge of substance so clearly and unequivocally establishes guilt as to merit conviction in the circumstances.

Furthermore, Articles II-XV allege perjury. In our law charges of perjury are notoriously difficult to prove and are not lightly made. There is a famous dictum, quoted by Wigmore and cited with approval by the Supreme Court to the effect that the common law "throws every fence around a person accused of perjury."[4] Rigorous examination and cross-examination in the first instance has always been the preferred method for separating the true from the false. With respect to the judge's testimony, the method was fully employed at the judge's 1983 trial, and the jury made the separation.

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[4] *See Bronston v. United States*, 409 U.S. 352, 359-61 (1973) (Burger, C.J.) (reviewing reasons why the law has and should "'throw every fence round a person accused of perjury.'")

In these proceedings the perjury articles are surplusage. The Justice Department categorically declined, for good reason, to prosecute for perjury when urged to do so by the FBI. Ten of the perjury articles concern matters determined by the jury. None of the ten is backed by evidence that was not available to the prosecution at the time of trial. The remaining four relate to tangential matters to do with phone calls about which the judge made an honest mistake. For these articles, in any event, the standard and quantum of proof must be higher then clear, unequivocal, and convincing. It can only be proof beyond reasonable doubt.

There is a danger that the massive record might obscure the fact that the whole of the prosecution's case is built on evidence that is fragmentary, fragmented, circumstantial, and stale. When there is little evidence, it is not difficult to create seemingly plausible scenarios by filling in the gaps with speculative inferences and unwarranted juxtapositions, as in the case of the prosecution's so-called "Master Chronology", which is more full of holes than a piece of Swiss cheese. The prosecution has built up a single scenario from the fragmentary pieces of a data that remain. It is largely speculation. On no article does it even satisfy the test of preponderance of the evidence. It is manifestly neither clear nor convincing and certainly not unequivocal. Replete with speculation and doubt, it could never satisfy the test of beyond reasonable doubt.

From the fragmented and fragmentary circumstantial evidence the judge could also weave one or more stories at least as plausible, but also as speculative, as that of the House. When the judge has had firsthand knowledge, he has told his story by direct evidence. He has, when pressed, offered alternative explanations to the House's speculations. He has, for example, offered several possible explanations of how Mayor Clark might have learned of the wire tap and of how Borders might have learned about the details of the *Romano* case. He has adduced evidence of Borders's other rainmaking activities. Again and again, he has been pressed by the House to take over their burden of proof. The burden of proof is and remains on the House in respect of every article, and, by any standard, it has failed to discharge it.

Another principle at stake is the presumption of innocence. This is a case of a highly respected judge and a much loved man whose whole life, when placed under the most extensive scrutiny, has emerged with a record that is not only unblemished, but of which any person could be proud. One fact in that record stands out: his indifference to money. What are the prior probabilities that such a man would risk his office, his career, and his respect in a dishonorable, dishonest, and incompetent scam? What are the posterior possibilities that he would have sacrificed his career, his health, and such little money as he had to fight for his honor in a eight-year ordeal, when he could have quickly resigned at almost any stage in the process? These prior and posterior probabilities strengthen his right as a judge and a citizen to be presumed innocent until proven guilty.

History will also judge whether overall these proceedings have lived up to civilized standards of due process. The judge has been at pains to thank the Impeachment Trial Committee for the care and the courtesy with which it has conducted its hearings. But that is only one episode in an eight-year marathon. Of the many grounds for complaint about the fairness of the procedure overall, one stands out: At every stage the judge has had to counter the massive resources of money and personnel of the State out of the modest resources available to him, backed by the assistance of a small group of volunteers who believe in him and his cause. As a result, his financial security has been destroyed; his health, impaired; eight years of his life, consumed; and his future, irreparably damaged. What will be the verdict of history on that as an example of American due process?

Against the background of these general principles, let us consider the House's case. The detail has been exhaustingly canvassed elsewhere. Here let us focus on two matters: the quality of the witnesses and of the evidence adduced by each side, and the six points highlighted by Mr. Bryant as the strongest points in the House's case in his closing statement before the Impeachment Trial Committee.

The fragmented, fragmentary, stale, and circumstantial nature of the evidence has already been pointed out. Almost as striking is the quality of the witnesses on both sides. Consider, on the one hand, the demeanor, the character, and the credibility of the main witnesses for the defense: Judge Latimer, Judge Rogers, Judge Perry, Judge King, Kenneth Robinson, Martin Raskin, Jesse McCrary, Neil Sonnett, and Jeffrey Miller, who either vouched for the judge's character and reputation or corroborated his evidence or both. Consider also the judge himself, who once again subjected himself to three days of relentless examination and cross-examination and emerged with honor.

Contrast, on the other, the motley procession of convicted felons, underworld figures, undercover agents, disbarred lawyers, and evasive witnesses upon whose testimony the House must rely. Mayor Clark and his cronies have only to be seen to be disbelieved; Hemphill Pride and William Dredge were, by their own admission, pursuing strategies to protect their own interests throughout; Agents Murphy and Mazzella might kindly be described as incompetent enthusiasts.

It has been shown that Mayor Clark's original story, repeated on several occasions, could not have been true. Hemphill Pride, as concerned as he was to save his own skin, acknowledged that he had been helped before by William Borders and Alcee Hastings without his knowledge and that he was upset about the letters *because* he believed that they were interfering in his efforts to get reinstated without consulting him. Dredge's stories changed as his interests changed and developed conveniently over time to fit the prosecution's hypothesis.

The quality of the sources of the House's evidence, insofar as they gave any support to its hypothetical scenario, is as inferior as its other evidence is fragmentary. Where there is conflict of testimony, which side's witnesses on a given point are more credible: Mayor Clark and Wedge Whittle or Joy Vickers and Dr. Roy Phillips? William Dredge or Jesse McCrary? The direct evidence of Neil Sonnett and Jeffrey Miller or circumstantial evidence corroborated only by that same Dredge?

And so to the main specific disputed facts. In his closing submission to the Impeachment Committee, Mr. Bryant listed the six main planks of his case:

> "The first is the repeated coincidence of documented contacts between William Borders at the significant junctures of the Romano case pending in Judge Hastings' court; second, the detailed inside information about events in the Romano case which Borders conveyed first to Dredge and later to Rico; third, Judge Hastings' appearance and conduct at the Fontainebleau Hotel on September 16th; fourth, the timing of the order for returning a substantial amount of the Romanos' property that was issued on October 6th; fifth, peculiar coded conversation of October 5th between Judge Hastings and William Borders on the afternoon before the order was issued; and sixth, Judge Hastings conduct upon learning of William Borders' arrest in Washington, D.C.

These disconnected fragments were stated by the House to be the main elements of their case. The arguments of each side are generally summarized fairly in the Impeachment Trial Committee's Report, only needing to be corrected on some specific points. If these are the crucial fragments in the House scenario about Borders, each has been convincingly disposed of.

The short answer to Mr. Bryant's first point -- the alleged coincidence of repeated contacts between Judge Hastings and Borders -- is that they had a lot to talk about: affairs of the National Bar Association and its Judicial Council; Hemphill Pride's problems; the suit against President Reagan; and the host of other professional and personal concerns of two men who had been associates for more than a decade. The long answers is in the judge's brief.[5]

The short answer to the second point, about detailed information concerning events in the *Romano* case, is that some of this information was public and publicized knowledge, all of the information could have been obtained through Dredge or Nesline or possibly through the Romanos themselves, through leaks, or through any of the other sources a corrupt "rainmaker" might have developed. The long answers is in the judge's brief.[6]

The short answer to the point about Judge Hastings's appearance and behavior at the Fontainebleau Hotel is that he was invited by Borders (not disputed); that he did make efforts to find Borders who had anyway stood him up before; that it is sheer speculation to ask how an innocent person would have behaved in the circumstances; and that there were some obvious maneuvers a guilty person might have made to protect himself, which were not made by Judge Hastings, such as to page for his host or to insist that the place settings for four be left on the table. The long answer is in the judge's brief.[7]

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[5] *Brief for Respondent: Judge Alcee L. Hastings,* (*"Brief"*) at 14-21 and materials cited.

[6] *Id.* at 16-19 and materials cited.

The short answer to the fourth point, the timing of the *Romano* order, is that the order's timing was *inconsistent* with Borders's promise -- the order was not issued until a week after the date by which Borders had firmly promised it would be out, and the timing of the order was entirely *consistent* with the version of the events testified to by Judge Hastings and corroborated by Jeffrey Miller. The long answer is in the judge's brief.[8]

The short answer to the fifth point, the alleged coded conversation, is that the most obvious interpretation is that this was uncoded conversation which presupposed prior unrecorded conversations; that the alleged expert on conversation analysis conceded that on his own analysis this conversation referred to others of which there is no record; that there is no scientific basis for his interpretation of such a conversation other than his own unpublished and incomplete research on the topic; that 79 words taken out of context is rather short for determining whether a conversation is coded or not; and that House interpretation is inconsistent with the House's theory. The long answer is in the judge's brief.[9]

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[7] *Id.* at 16-19, 23-24 and materials cited.
[8] *Id.* at 14-18, 24 and cited materials.

The short answer to the sixth point, Judge Hastings's departure from Washington and his use of Baltimore Washington Airport, is that: First, he was in shock; second, his natural instinct was to return directly to his disabled mother who lived in Fort Lauderdale, not Miami; third, that he was advised by Hemphill Pride, an experienced criminal lawyer, to meet the FBI on his own turf.[10] The long answer is in the judge's brief.[11]

Mr. Bryant skillfully elicited and marshalled the few facts that gave ground for suspicion. They are fragmented and fragmentary. None can do more than, at best, create a doubt on the basis of inference upon inference. All can be explained in more than one way. In sum they create suspicion on the basis of speculation about one of a number of possibilities in a vacuum of information.

These are Mr. Bryant's main six points on Articles I-XV. The evidence in respect of Article XVI, another case of piling on, is so weak that it does not even meet the standard of "no case to answer", but it has been answered in the judge's brief.[12] The "catch-all" article, Article XVII, even more inappropriate than in the embarrassing *Ritter* impeachment, is yet more surplusage and piling on.[13]

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[9] *Id.* at 24 and cited materials.

[10] Judge Hastings concedes in retrospect that he may have made an error of judgment in the heat of the moment, but this is hardly evidence of consciousness of guilt and hardly grounds for impeachment. *See Wong Sun v. United States*, 371 U.S. 471, 483 n.10 (1963) (for a useful admonition and summary of the Supreme Court's views on the weight to be given evidence of "flight" in any event).

[11] *Brief* at 19-21, 27-28 and cited materials.

Neither these nor other points made by the House, on their own or taken together, approach satisfying any standard of proof, let alone the threshold test of clear, unequivocal, and convincing or the more exacting standard, which is appropriate in this case, of proof beyond reasonable doubt. The House has presented its case, and by any standard it fails.

Respectfully submitted,

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[12] *Id.* at 30-34.
[13] *Id.* at 34-36.

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I. INTRODUCTION

A. The Nature of the Case and Its Importance

Judge Alcee L. Hastings is an innocent man. That was the unanimous verdict of the twelve jurors who heard the testimony and considered the other evidence more than six years ago. That remains the judgment of those who know the man best and have considered the matter with any care. The judge's performance as a judge and his reputation for honesty and integrity are such that those who know him and must trust him most were and, six years after the fact, remain content with the jury's verdict. Never before has the Senate been asked to convict a man and remove a judge in circumstances such as these.

This is a case in which the Senate is asked to repudiate the verdict of a jury because those who knew neither the man nor the reputation were uncomfortable with the idea that an acquitted judge might continue to serve as a federal judge. In any fair view of the record and the investigations that preceded it, this is a case in which the Senate is asked to substitute a residue of suspicion created by the conduct of others for evidence of guilt of the kind that must be required in cases of impeachment. That view is wrong: If suspicions created by others and accusations unsupported by direct evidence are enough to warrant removal of a sound and able judge, no judge can have the security and independence necessary to make decisions that disappoint potential accusers in positions of power.

Every Senator should consider with care the extraordinary combination of views the House would have the Senate adopt in this case. The House asks the Senate to remove a judge who is presently viewed by leaders of the bench and bar in the community he serves as an outstanding district court judge who fully satisfies the highest standards of honesty and integrity. The House asks the Senate to convict this judge without direct evidence of guilt, based solely upon attenuated circumstantial inferences of a kind the jury unanimously rejected as inadequate more than six years ago.

The House, in reality, asks the Senate to convict this judge because an ill-conceived and prematurely terminated FBI undercover operation left a residue of suspicion that no individual could dispel. The House asks the Senate to convict this judge eight years after the fact based upon evidence gathered and preserved by accusers who enjoyed largely unlimited resources without regard to the fact that additional evidence had been lost or destroyed long before the House exhibited its articles in the Senate. That combination of views would suffice to make this case one of historic significance, but the nature and quality of the evidence offered as justification in this case enhances its importance.

B. The Standard of Proof to be Applied

The Impeachment Trial Committee correctly identified an issue that is central to this case. There are factors present in this case which should require that each Senator consider with special care the standard to be applied in deciding whether the evidence so clearly establishes guilt as to merit conviction.[1] In respondent's view, the circumstantial evidence in this case is so fragmented, fragmentary, and stale that it could not properly be marshalled to satisfy even the "mere preponderance" standard which the managers for the House urge the Senators to adopt. In that view and in light of the position the House has taken on other occasions, the fact the managers make the claim that this is the standard to be applied here may be viewed as a tacit admission of the weakness of their case. But the claim is dangerous, and the issue does merit careful study and consideration in this case of impeachment.

When it has considered the question outside the advocacy context, the House has recognized, at least tacitly, that the evidence must be clear and convincing, at a minimum, to justify a conviction in cases of impeachment.[2] Moreover, the nature of the offenses alleged here would require a plaintiff to satisfy that standard even in a garden-variety civil case. This is a case involving serious charges of fraud and perjury. The minimum standard applied in civil cases involving such allegations is the "clear and convincing" standard, not a mere preponderance of the evidence standard.[3] But the clear and convincing standard is only the threshold that every Senator should require the House to satisfy in any case of impeachment and certainly in cases in which it makes accusations such as those made here.

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[1] *Report of the Impeachment Trial Committee*, S. Rep. No. 156, 101st Cong., 1st Sess. 5 (Oct. 2, 1989). The report will be cited here and in the accompanying appendices as "Rep. at ___." Citations to the printed record in this brief and its appendices will follow the conventions adopted by the committee for its report. Rep. at 4n*.

[2] *See*, J. Labovitz, *Presidential Debate* 191-200 (1978); *compare* House Comm. on Judiciary, *Report: Impeachment of Judge Alcee L. Hastings*, 100th Cong. 2d Sess. 64 (1988).

There are additional circumstances here present that, in fairness and conscience, require Senators to apply a far higher standard in a case such as this. The Impeachment Trial Committee properly calls attention to the fact that the judge was acquitted of the essential accusations made here upon the unanimous verdict of a jury after a full trial more than six years ago.[4] Professor Laurence Tribe of Harvard, even as he agreed that the 1983 verdict should not constitute an absolute bar to a second trial in the Senate, concluded that the presence of that verdict required enhanced scrutiny by every Senator in this case.[5] Surely, that verdict must be entitled *some deference* and must be accorded *some weight* by every Senator.

The lapse of time and its effect on the evidence available to respondent must, in fairness and conscience, also be given *some effect* by every Senator in deliberating on the proper disposition of this case. The presence of the verdict and the effects of the inordinate lapse of time require that every Senator accord *some deference*, *some effect*, and *some special scrutiny* in reviewing the evidence the House has submitted. The necessary deference, effect, and scrutiny could only be given at this stage, however, if every Senator required that the evidence satisfy a standard that is *higher* than the threshold standard of clear and convincing evidence, the minimum standard that should be applied in any case of impeachment and certainly in one that alleges offenses of the kind alleged here.

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[3] *See, e.g., Addington v. Texas*, 441 U.S. 418, 423-24 (1979) (Burger C.J.) (discussion of the function of the various standards and the factors that have governed the selections of a proper standard in various cases); *see also Bronston v. United States*, 409 U.S. 352, 359-61 (1973) (Burger, C.J.) (reviewing with approval reasons why the law has and should "'throw every fence round a person accused of perjury.'")

[4] Rep. at 5-6.

[5] "'There's no doubt that fairness requires an especially careful look at the evidence in light of the acquittal,' says Prof. Tribe." *Judge, Facing Impeachment Trial, To Employ Double Jeopardy Defense*, Wall Street Journal (Mar. 8, 1989).

It is clear that the standard of "proof beyond reasonable doubt" may properly be insisted upon by any Senator. Cases of impeachment are *sui generis*, and the fact that they may not be criminal for all purposes does not end the inquiry. The Supreme Court has long-recognized that even civil actions may be *quasi*-criminal in the terms of the stigma and sanctions that may be imposed, and that, in cases such as those, due process may require that the proof beyond a reasonable doubt standard be applied, even if it does not require that all the protections incident to a criminal case be observed.[6] Whatever the proper view in other cases of impeachment, surely the circumstances of this case are such that every Senator should, in fairness and conscience, scrutinize the evidence against the most exacting standard before passing judgment eight years after the fact upon an acquitted Judge Hastings.

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[6] *See, e.g.*, *In re Winship*, 397 U.S. 358 (1970) (holding that proof beyond a reasonable doubt is applicable in juvenile delinquency cases, notwithstanding their designation as civil cases) at B8.

For those Senators unwilling to apply the highest standard, even in a case such as this, there is an intermediate standard that falls between the highest and the threshold standards -- the standard sometimes framed as proof by "clear, unequivocal, and convincing evidence" that the facts necessary to support a judgment are true. This is the standard that the Supreme Court has held is required when a citizen or resident is threatened with removal and banishment from the country.[7] Surely the standard can be no less in a case where the House asks the Senate to convict and remove an able judge of high reputation and condemn him to the banishment of infamy on the accusations that he is guilty of heinous crimes. We address this issue further below. *See infra* at 36-40.

C. The Nature of the Record and the Requirements for a Fair Review

The quantity of the evidence and the limited time available for review pose special problems for every Senator. The Impeachment Trial Committee submitted to the Senators:

1. The *Report of the Impeachment Trial Committee*, dated October 2, 1989, a 150-page report, supplemented by more than 30 pages of addenda, and

2. The five-volume printed record generated in the proceedings conducted by that Committee, more than 7550 pages in all.

The evidentiary proceedings before the committee were televised and recorded; a substantial video cassette record of those proceedings is also available for Senators to review. It is unlikely, however, that any Senator will have the time that a complete review would require.

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[7] *See, e.g., Woodby v. INS*, 385 U.S. 214 (1966); *cf., Addington*, 441 U.S. at 424.

The presence of this massive record entitles Senators to guidance that will facilitate their review. Every Senator should have, at the outset, a clear statement of the case that provides a concise view of the evidence and a firm expression of how each party thinks it should be viewed as a whole. Every Senator should have, at the outset, a clear statement of the issues and concerns that this case raises and the principles that should be considered and applied in resolving them -- a statement that, at a minimum, fairly responds to the specific issues of principle and conscience that the committee identified. The Statement of the Case and the Statements of Concerns and Principles developed in the next two parts of this brief seek to satisfy those threshold requirements on behalf of Judge Hastings. In the view of the judge and his counsel, those parts alone should satisfy many Senators that this is a case in which acquittal is required. Nonetheless, they recognize that many Senators may require more.

Every Senator should also have available a comprehensive statement of the evidence that satisfies two criteria. First, it should be complete. It should report the events and identify the evidence that are material to either side's view of the case. The *Report of the Impeachment Trial Committee* largely satisfies this criterion. Second, it should present that evidence in a manner that respects the presumption of innocence and enables Senators to assess whether the House has met its burden, however defined, of proving guilt. The requirement of neutrality that the Senate imposed precluded the committee from preparing a statement that satisfied this second criterion, a preclusion the committee acknowledged.[8]

The problem may be simply illustrated. This is a circumstantial case. As the committee acknowledged, the views taken are likely to be influenced by the manner which events and records are juxtaposed and presented.[9] For example, should a three-minute call the judge made to William Borders at 7:30 a.m. on February 20, 1981, be juxtaposed with the fact that Judge Hastings and Borders had both planned to and did attend a meeting of the National Bar Association and its Judicial Council on Miami Beach on February 26, 1981, to corroborate the judge's direct testimony that the obvious explanation of that telephone call was the true explanation -- that the two men discussed plans for the coming weekend? Or should it instead be juxtaposed with the fact that evidentiary hearings were scheduled to be held in the *Romano* case later that day in a manner that suggests the speculative inference the House urges -- that the two men discussed a scheme to bribe the Romanos?

A statement that respected the presumption and the allocation of the burden would, in the first instance, juxtapose the call with the innocent meeting. It would then report the event in the *Romano* case because the House claimed it was significant. It would leave to Senators the question whether the House had carried the burden of demonstrating that the presumptive innocent juxtaposition was wrong and that alternative juxtaposition was correct and supported an inference of guilt.

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[8] Rep. at 9-11

[9] *E.g., id.*

There is only one comprehensive statement of the evidence concerning Articles I through XV that satisfies *both* these threshold criteria. That statement, *A Comprehensive Statement of the Evidence*, was prepared and submitted on behalf of the judge to aid Senators as well as the committee.[10] It has been revised to conform its citations to the printed record and is reproduced in that form as an appendix to this brief. *See* "A Comprehensive Statement of the Evidence Concerning Articles I-XV," Appendix A, *infra*.[11] We submit that fairness to the accused and respect for the presumption of innocence should compel any Senator who believes that a detailed analysis of the evidence is necessary to study that statement *before* undertaking to consider whether the evidence and arguments submitted by the House satisfy its burden of proving guilt by any standard.

There is a further aspect of this case that, as the Impeachment Trial Committee notes,[12] merits consideration. Eight years after the fact the evidence is incomplete. Every Senator should be aware of the nature and extent of the pieces of the puzzle that are missing *before* undertaking to assess whether those that remain suffice as a basis for reconstructing a true picture of what occurred with the degree of certainty and fairness that must be required in this case. A *Statement Concerning Unavailable Witnesses and Records and Their Relevance* was prepared to inform the committee and Senators of the nature and extent of the evidence is no longer available.[13] For convenience, a copy conformed to the printed record is included as an appendix to this brief. *See* "Statement Concerning Unavailable Witnesses and Records and Their Relevance," Appendix B, *infra*.[14] Senators should also read this statement so that they may be aware of the evidence that is missing *before* they undertake to assess that which remains.

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[10] 2C at 3199-3202

[11] This brief will cite facts reported and documented in the Comprehensive Statement by part and paragraph number -- *i.e.*, "Comp. St. II, ¶¶ __."

[12] Rep. at 10.

Even after this review, there remains a concern that the mass of detail and the House's claims might cloud the true issues and persuade some Senators to substitute suspicion concerning the judge's innocence for the proof of his guilt that should be required. The ultimate danger is that Senators who study only the printed record and the House's claims will become lost in the detail and be misled into equating "bulk" with "weight."

To aid Senators in avoiding this further danger, we have prepared more detailed statements and analyses of the evidence, as they bear upon the specific arguments advanced by the House and the specific factual issues identified by the Impeachment Trial Committee and submitted them in a further and separate appendix. *See* "Detailed Statements and Analyses of the Evidence and the Managers' Arguments," Appendix C.[15] The time available and the fragmentary nature of the data has precluded statements and analyses that explore all the possibilities in the evidence or all the flaws in the arguments upon which the House's claims rest. The analyses developed should, however, suffice to demonstrate for those who undertake to study the detail that the evidence only suffices, at most, to cast suspicion on the judge and creates, at least, considerable doubt about those who conducted the initial investigations.

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[13] 2C at 3262-71.

[14] This brief will cite matters in that statement to the page in the appendix on which they are reported and discussed -- *i.e.*, "App. B at __."

II. STATEMENT OF THE CASE

A. Who is This Accused and Why Do the Managers Ignore the Man

The House never discusses the integrity that Judge Hastings had demonstrated over the forty-two years that preceded his appointment to the federal bench. The House never explains why a man who had no great financial ambitions and whose judicial salary afforded him more security than he had known before would agree to participate in a corrupt scheme such as the one alleged in Article I. Instead, its managers allude to indications of his interest in owning a home as if this were somehow adequate evidence of motive.[16]

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[15] The brief will cite matters developed in that appendix by the number of the section or sections in which they are developed -- *e.g.*, "App. C at § I.A.1."

[16] *See* App. C at § I.A.1.a.; Rep. at 23-25.

The House never discusses the integrity that the judge has demonstrated in persevering over the eight years since Borders's arrest and over the more than six years since his own trial and acquittal. There is no explanation, other than innocence, that could account for the judge's having endured the extraordinary financial and psychological burdens that have been imposed upon him over the past six years. These were burdens that have destroyed his financial security, impaired his health, and threatened his future. These were burdens the judge could have avoided with the stroke of a pen. He could have resigned. These are burdens and threats of a kind and magnitude from which any man who was motivated by money or who had an uneasy consciousness of guilt would have "fled," especially when the "escape" would have been simple, secure, and complete.[17]

It was the judge's performance over the span of his lifetime and the reputation he had earned that established the prior probability that must be confronted: What was the probability that a man of this kind would corrupt his office for financial gain? The judge was entitled to insist that the jury consider that prior probability, in addition to the normal presumption of innocence, in assessing the weight to be assigned the circumstantial case the government presented in 1983. He is entitled and does insist that every Senator consider that prior probability as he or she reassesses the circumstantial case as the House has presented it here.

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[17] Judge Hastings submitted a statement of Assets and Liabilities to the Impeachment Trial Committee. It bears upon the points addressed here and elsewhere in the brief. A copy is included in Appendix D, "Miscellaneous Materials."

It is the judge's behavior since his acquittal and the failure of his accusers to find anything of significance that would undermine the reputation he has earned that defines the posterior probability: What is the probability that a man who was guilty of the crimes alleged here would have persevered in the face of accusers with unlimited resources and have emerged six years later with his reputation intact and no new charges of significance? The judge is entitled to and does insist that every Senator consider the posterior probability as he or she assesses the circumstantial case the House has constructed here.

The House also never explains why any Senator should credit the testimony of a William Dredge or a Mayor Stephen Clark or the like over that of a man whose reputation for truth and honesty is so strong it has withstood and survived the continuing attacks of the last eight years. It is to the testimony of the judge and those who testified in his behalf that Senators must look if they seek truth. Those are witnesses who acquired their credibility and reputations the old fashioned way: They earned them.

Instead the House asks the Senators to look only at the data and testimonial propositions its managers have culled from the printed record which they claim can be marshalled into a web of inferences that "overwhelmingly" establishes guilt. The fragmented and fragmentary data that remain do not provide a proper foundation for such an argument. There are significant flaws in particular inferences they claim are established by the evidence and upon which they must rely in constructing the web.[18] More importantly there are major flaws in the web itself.

B. Article I: The Conspiracy That Could Not Have Existed

Article I realleges that Judge Hastings was a knowing participant in William Borders's corrupt 1981 scheme to extract $150,000 from the Romanos. The mass of detail presented by the House should not be permitted to obscure two basic facts. First, the contacts shown by the telephone and travel records that remain can be marshalled into a pattern that *is consistent* with the judge's innocence, a pattern that is corroborated in significant measure by direct testimony and other evidence. Meetings of the National Bar Association, its Judicial Council, and its executive committee; Pride's release from prison and his passionate desire to avoid disbarment and one day to regain admission to the bar; Borders's dispute with, suit against, and ultimate victory over the President; the judge's trips to and through Washington for ABA committee meetings or speaking engagements; the dinner-cruise for Borders -- these and other events in 1981 fully justified and fairly explained the indicated contacts between the two men and their timing.[19]

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[18] Those flaws are identified in the Detailed Statements and Analyses, App. C at § III.

Second, the pattern *is inconsistent* with guilt. For example, *by all accounts*, it was during the first week in September, and prior to September 10 in any event, when Judge Hastings instructed Jeffrey Miller, his law clerk, to draft the order giving the Romanos their money back. It was not until September 10, however, that Dredge cut his deal with the government and *first* called Borders to say the Romanos were ready to deal. Thus, the judge's decision to give the money back had been made *before* the government's attempt to make a "deal" with Borders had been initiated. Neither the House nor the evidence satisfactorily explains how the timing of this decision can be reconciled with a claim that Judge Hastings was waiting for Borders to cut a deal.[20]

All concede that the judge's order was in fact compelled by precedent. The only claim is that its timing is evidence of guilt. That claim will not wash. *By all accounts*, Judge Hastings did not urge Miller to complete the order *at any time* between September 10 and October 5. Borders, however, had promised H. Paul Rico, the undercover agent posing as Frank Romano, that the order returning a substantial part of the property declared forfeit would be issued "within 10 days" and by September 29 in any event. The total absence of *any* attempt by the judge to urge, let alone direct, his clerk to complete the order prior to October 5 cannot be reconciled with the claim that the judge was party to Borders's promise that the order would be issued by September 29.[21]

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[19] Comp. St. II, ¶¶ 7, 10, 12, 13, 14, 23, 24, 25, 26, 31, 32, 39, 40, 44, 49, 50, 53, 54, 56, 58, 62, 63, 64, 68, 70, 73, 75, 76, 77, 78, 79, 82, 85, 86; App. C at § I.B.; *cf.* Rep. 31-56.

[20] Comp. St. II, ¶ 50; App. C at § I.B.3.

Moreover, eight years of investigation have produced no evidence of any contact between Borders and the judge between September 29, the date by which Borders said the order would issue, and 4:22 p.m. on October 5, the time when Borders assured Rico/Romano the matter *had been* taken care of. Wherever Borders was getting his information, it was *not* from Judge Hastings, and whatever concerns Borders had over the timing of the order were *not* shared by Judge Hastings. The order was not issued on the promised date, and there is no evidence of contacts that would have been required if Judge Hastings had been a participant on Borders's scheme.[22]

These flaws must be considered in light of a further point. The principal events the House urges as evidence of guilt were orchestrated by persons who had a common objective: They *wanted* and *needed* to create a scenario in which Borders could manipulate events to create the *appearance* that the judge was a guilty participant in his corrupt scheme. It is no longer disputed that Borders did in fact hold himself out to criminal associates as a "rainmaker". He claimed that he had the power to control and influence decisions by judges other than Judge Hastings. He made those claims with respect to judges whose integrity has never been questioned. In 1981, as even the FBI has acknowledged, respondent also was such a judge. At the same time, it is equally clear that Borders had effectively concealed this aspect of his character from his family, his friends, and his associates in the profession, in high public office, and in other political positions. Judge Hastings fell into that latter category. He was both a friend and an associate who had obtained high office.[23]

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[21] Comp. St. II, ¶¶ 60, 67, 71, 74; App. C at § I.B.3.

[22] Comp. St. II, ¶¶ 67, 69, 70, 72, 73, 74, 75, 76; App. C at § I.B.2 and 3.

It is clear that, as a rainmaker, Borders shared a common objective with William Dredge, the informant-drug dealer, and with those in the FBI responsible for designing and implementing the undercover operation, Operation Apple Eye. For any of them to achieve their respective goals, it was necessary that Borders manipulate events to make it *appear* that he had some control over the judge. Borders must have known that even the existence of his friendship with the judge would not satisfy someone like the Romanos. He must have known that he would have to cause or accurately predict some action by the judge that would make it appear the judge was responding to Borders's direction.

More important, Dredge must have known that the government's position on the value of his cooperation, and thus his sentence in the drug case, were likely to depend upon Borders providing a credible demonstration implicating the "big fish," the federal judge, a demonstration that corroborated Dredge's "information" and the value of his "cooperation." The FBI agents, and the prosecutor who advised them, wanted to make a case, and they knew that something more concrete than Borders's assurances would be required to warrant action against a federal judge. No one in this unholy alliance could have proceeded unless Borders had created an *appearance* of control.[24]

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[23] Comp. St. I, ¶¶ 23, 25, 26, 27; II, ¶¶ 41, 42, 43, 45, 46, 47; App. C at §§ I.A.2 and 4, I.C., I.E., II.B.

Borders's invitation did induce the judge to appear at the Fontainebleau on September 16, the first step in the demonstration. Borders's confident prediction that the order would be issued by September 29 proved false, however, and established only that he was unaware that Miller's term as clerk had been extended beyond the end of September. Given the judge's failure to issue the order on time and the marginal nature of the dinner at the Fontainebleau as evidence suggesting the judge's involvement, the FBI's insistence and the Justice Department's agreement that Borders be arrested at the scene of the payoff was outrageous. That indefensible decision assured that the events they had contrived to create would unfairly cast a cloud of suspicion over the judge that could never be fully dispelled.[25]

Every Senator should keep firmly in mind the fact that the participants in this unholy alliance had a common need to manipulate events to create an *appearance* that the judge was a participant in Borders's scheme. Only in this way can Senators separate the undisputed evidence of Borders's corruption and Dredge's manipulations from the tenuous circumstantial evidence that bears upon the judge's conduct. The evidence of Borders's guilt was clear long prior to the arrest and is largely irrelevant to the issues here, but there is danger of unfair prejudicial spillover if that fact is not borne firmly in mind.

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[24] These points are developed further in the Detailed Statements and Analyses, App. C at §§ I.C. and II.B.

[25] *See* App. C at § I.C.

Moreover, there are strong indications in the evidence that Dredge, in fact, played a far more significant role than he has acknowledged. It seems likely that he was playing both sides of the street to assure that Borders had the information necessary to persuade the FBI that the judge was involved. So too, there are indications in the evidence that FBI agents and the prosecutor, in their enthusiasm to make a case, may have wittingly or unwittingly acted to manipulate events and may have assisted Dredge in his manipulations. These facts not only bear out Judge Hastings's claims that he is innocent, but also bear directly upon the significance the Senate should assign to the FBI's decision to arrest Borders without waiting to see if any of the money would have gone to the judge.[26]

The House managers in 1989, as did the prosecutors in 1983, seek to bolster a marginal case by characterizing Judge Hastings's return to his home in Florida on October 9, 1981, as "flight" evidencing a guilty state of mind. Neither the characterization nor the claimed inference can stand. When Judge Hastings was advised that the FBI had arrested Borders and wanted to talk to him, he had the same three choices that every citizen has. He could have properly declined to be interviewed at all. He could have met with FBI agents in Washington. He could have returned home and agreed to speak with them in a community where he enjoyed considerable support and had access to advisors he knew and trusted.

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[26] The indications are described and analyzed in some detail in the Detailed Statements and Analyses, App. C at §§ I.C. and II.B.1 and 2.

None of these choices could fairly be characterized as supporting an inference of guilt under our system of government, certainly not when made by a citizen knowledgeable about the criminal justice system. Judge Hastings was advised to take the third course. The fact that he lived with and cared for his invalid mother virtually dictated that he take that course. He returned to Fort Lauderdale and later that same day spoke with FBI agents. By their own account, he freely answered all the questions they propounded. His conduct was both appropriate and consistent with the conduct that might be expected of a person in a position such as his.

Moreover, the attempted characterization in this case asks the Senate (as it asked the jury) to ignore the obvious. Judge Hastings was a black, liberal judge responsible for deciding politically sensitive cases on which his views of the proper application of the Constitution and laws of the United States had differed and were likely to differ from those in the then-administration. He had just learned that the FBI had arrested one of the most prominent black, Democratic lawyers in the country -- the immediate past-president of the National Bar Association, a former adviser to the Carter administration and the Democratic National Committee, and a man who had just sued President Reagan and won. He was properly shocked and has more than adequate grounds for suspicion. Given the FBI's then-record with respect to black political figures, it is the judge's decision to speak with FBI agents at all, rather than his decision to return to his home community before doing so, that is noteworthy.[27]

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[27] In the context, the Supreme Court's consistent admonitions that evidence of "flight" must be viewed with great caution seems particularly apt:

> . . . [W]e have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime. In *Alberty v. United States,* 162 U.S. 499, 511, this Court said:
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> > . . . it is not universally true that a man, who is conscious that he has done a wrong, 'will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right and proper;' since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that "the wicked flee when no man pursueth, but the righteous are as bold as a lion."
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> See also *Hickory v. United States,* 160 U.S. 408; *Allen v. United States*, 164 U.S. 492; *Starr v. United States*, 164 U.S. 627; and for the views of two Courts of Appeals see *Vick v. United States,* 216 F.2d 228, 233 (C.A. 5th Cir.) ("One motive is about as likely as another. Appellant may be guilty, but his conviction cannot rest upon mere conjecture and suspicion"); cf. *Cooper v. United States,* 218 F.2d 39, 41 (C.A.D.C.Cir.) ("After all, innocent people caught in a web of circumstances frequently become terror-stricken"). But cf. *United States v. Heitner,* 149 F.2d 105 (C.A. 2d Cir.).

Wong Sun v. United States, 371 U.S. 471, 483 n.10 (1963). See also, *e.g.*, *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1973) (for an analytic statement of the logical problems in infering guilt from al-

C. Articles II-XV: Attacks on the Honest Account of an Honest Man

The allegations that the judge testified falsely at trial made in Articles II through XV must also be rejected. If the judge was not a guilty participant in Borders's corrupt scheme, then his denials and his explanations for the circumstances and events the prosecutors urged as evidence of his guilt must be accepted as a presumptively honest account. If he was guilty, his testimony was false. The decision on Article I should be dispositive.

Moreover, the House simply ignores the conflicts in its own evidence or overlooks evidence that conflicts with its theory.

1. *Articles II-VI: Judge Hastings's Denials and Borders's Appearance at the Sheraton on September 12.* The House alleges that the judge lied when he testified that he was surprised when Borders appeared at the Sheraton on Saturday evening, September 12. It would have Senators infer that Borders and the judge met at Washington National Airport on the evening of September 11 and agreed that Borders would return to report on his meeting with Rico/Romano on September 12. On this basis, the House claims that the judge's claimed surprise was a false statement intended to corroborate his denials.[28]

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leged flight); *United States v. Hernandez-Bermudez*, 857 F.2d 50, 54 (1st Cir. 1988) (recent reaffirmation of the need for caution)

[28] Post-Trial Memorandum of the House of Representatives ("House Mem.") at 100-01.

The House's account cannot withstand scrutiny. If the judge had been a participant in Borders's scheme and if he and Borders had met on Friday, September 11, 1981, there would have been no need for Borders to make a hasty departure from his long-planned family reunion, a departure that was sure to be noted and recalled, and the judge surely would not have assembled a party of five so that Borders's return could be observed and recalled. Arrangements for the judge to have dinner at the Fontainebleau would have been made through a simple and undetectable pay phone call. The only plausible explanation is that Borders had to return to deliver a personal invitation that would persuade an unsuspecting Judge Hastings to go to the Fontainebleau with the expectation that Borders would be there.[29]

2. *Articles II-VI: The Denials and Dinner at the Fontainebleau.* The House claims that the judge lied when he said Borders had invited the judge to meet Borders at the Fontainebleau on September 16.[30] The House ignores the fact that, if the judge had been a participant in the conspiracy, the conspiracy would have ended on September 12, and there would have been no dinner at the Fontainebleau. The judge knew Frank Romano. He had observed him throughout the trial. There was a picture of Frank Romano in the court file in the judge's chambers. If there had been a conspiracy, the judge

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[29] Comp. St. II, ¶¶ 56, 58, 61, 62, 63, 64; *See* App. C at §§ I.B.2.c (for a narrative account); II.A.11-12 (for a fuller development of the analyses).

[30] House Mem. at 98-99.

would have shown Borders the picture, and the conspiracy would have ended then.[31]

3. *Article VII: The Judge's Instruction to Miller On October 5.* The House claims the judge lied when he explained his reasons for telling Miller to expedite the order on October 5.[32] Borders promised Rico/Romano that the order would be out by September 29 at latest and scheduled the final payoff for October 3 on that basis. It took Miller one day to convert his July draft into a final order when the judge finally told him to get it out. If the judge had been a participant in Borders's scheme, he would have instructed Miller to get the order out on Monday, September 21, or on Tuesday, September 22, or on Wednesday, September 23, or on some other day, any day, prior to Tuesday, September 29, the date by which Borders had firmly promised it would be out. If Judge Hastings had been a participant, the conversation with Miller on October 5 would not have taken place.[33]

4. *Articles VIII and XI: The Seventy-Nine Word October 5 Recorded Telephone Conversation and "Letters for Hemp."* The judge called Borders at 5:12 p.m. on October 5 and the two men discussed the letters for "Hemp" which the judge reported he had drafted that day. The House claims that the October 5 conversation should not be accepted at face value and that the judge's explanation and the drafts were after-the-fact recon-

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[31] *See* App. C at § II.A.11-12 (for further development of the point).

[32] Comp. St. II, ¶¶ 50, 51, 74; House Mem. at 103-04.

[33] Comp. St. II, ¶¶ 67, 74, 80; *See* App. C at § II.A.16 (for further development of the point).

structions. The recorded conversation, however, cannot be reconciled with the interpretation the House urges in support of its view.

The House claims that when Borders said "he wrote some things down for me," he was really reporting that he had received the down payment and that when he said he was "supposed to go back and get some more things," he was telling the judge about arrangements for the final payoff.[34] If Judge Hastings were a participant in Borders's scheme, he would have known *long before October 5* that Borders had got "some things" from Rico/Romano on September 19 and "was supposed to go back and get some more things" on October 3. In the House's view, the judge was asking whether the deal was still on as of October 5. No one can construe Borders's response as a satisfactory answer to that question. The judge's explanation of the conversation and the events that gave rise to it is the only account that makes any sense.[35]

5. *Articles X-XIII: Four Telephone Numbers.* The judge misidentified four numbers at his trial. He testified that they documented calls to Hemphill Pride. They did not. There is and was no dispute, however, that Pride and the judge were communicating regularly by telephone throughout the relevant period. Judge Hastings's identification of these numbers was a mistake, but the testimony was offered to corroborate a fact

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[34] *See, e.g.* Rep. at 88-89; *cf*. House Mem. at 83 (for an attempt to avoid the argument).

[35] Comp. St. I, ¶¶ 16, 18, 19; II, ¶¶ 24, 44, 52, 75, 76, 77, 79; *See* App. C §§ I.A.3, I.B.2; II.A.16 (for further development).

not in dispute. There is nothing in the record nor in logic that suggests that the mistakes were knowingly or intentionally made, and they concerned facts that simply were not material, then or now. They were honest errors made under the stress of two days on the stand, and no claim to the contrary can fairly be made.[36]

6. *Article XIV: Telephone Calls from the L'Enfant Plaza Hotel*. Judge Hastings testified that he made three long-distance calls from his room at the L'Enfant Plaza Hotel. None of those calls was reflected in the hotel records presented at the 1983 trial and here. The evidence leaves open two possibilities only. Either the records produced contained undetected errors or the judge's honest recollection was faulty. The former seems more likely. The judge's law clerk, as well as his mother, recalled receiving a call from the judge while he was at the hotel, and neither call was reflected in hotel records. During the critical 76-minute period, the HOBIS system recorded no long-distance calls from any room in the large and then fully booked L'Enfant Plaza Hotel. Hotel and telephone company records from which these errors might have been verified have long since been destroyed.[37]

The report of these calls was, in any event, immaterial to the case and in fact opened the judge to cross-examination on an unnecessary point. If there were errors, they could not have been intentional, and the jury necessarily so found. Accusations dependent upon records such as these, -- records that could have been, but cannot now be, tested and verified -- cannot be fairly resurrected at this late stage in any event.[38]

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[36] Comp. St. II, ¶¶ 10, 12, 24, 44, 52; *cf*. Rep. at 126-27; App. C at § II.E.

[37] Comp. St. II, ¶¶ 82, 87, 96, 97; App. B at 8.

7. *Article XV: The Decision to Use BWI Airport.* The House has never explained why the judge would have given false testimony on the reasons he chose BWI over National. He thought the earliest direct airplane flight to his home in Ft. Lauderdale left from BWI. The subsequent investigation showed that there was an earlier direct flight to Miami from National. He testified he was going home to protect his crippled mother and to defend himself on his own turf. He did and, once there, spoke freely with FBI agents.[39]

It is possible and perhaps probable that a manager or a Senator confronted with news that a friend and long-time political associate had been arrested by the FBI on accusations that concerned him or her also might have been less shocked and might have reacted differently. Senators who judge in this case, however, must place themselves in the shoes of Alcee L. Hastings on October 9, 1981, and must, as the jury was required to, assess the weight to be given the circumstantial data that the House offers as evidence that his testimony was false from that standpoint. From that standpoint, the evidence is unimpressive. Like the other false testimony accusations, this is one that the jury properly rejected, and its presence here can only be described as "piling on."[40]

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[38] App. B at 7-8.

[39] Comp. St. II, ¶¶ 100-103; App. C § I.A.1.b., I.B.4.

Apart from the four misidentified telephone numbers, the claims that the judge's testimony was false were submitted to the jury in 1983. The jury chose to believe the judge's denials and the essential accuracy of the explanations he provided. These same accusations were again reviewed by the Justice Department, when the FBI urged prosecution for perjury based upon the accusations and record certified by the Judicial Conference to the House for considerations of impeachment. The Department declined. In view of the concerns identified by the Impeachment Trial Committee,[41] the Department's reasons for declining prosecution should be noted here:

> The Judicial Council's report sets out fifteen allegations of perjury by Hastings at his trial. Most involve areas of his testimony which deny any illegal relationship with codefendant William Borders or give innocent explanations for various inculpatory actions. These alleged perjuries are not appropriate for prosecution. They either involve issues which were necessarily decided against the Government by the jury in reaching its not guilty verdict and, as such, are barred by the doctrine of collateral estoppel (see 9 U.S.A.M. § 69.272 and cases cited therein), or involve issues upon which both sides presented evidence at trial and the Government's evidence was insufficient to persuade the jury that Hastings was untruthful in his testimony. This failure to persuade the jury militates strongly against basing a perjury prosecution upon the same evidence.
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> There are, however, four statements by Hastings which are false and were not thoroughly dealt with at trial. These involve telephone calls, supported by telephone records, which he said he, or in one instance Borders, made to Hemphill Pride, a key figure in the trial. The calls Hastings says he made to Pride were not made to Pride. However, under

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[40] *See* App. C § I.D. (for a documented account).
[41] Rep. at 5-6, 123-24.

close scrutiny, the materiality and relevance which these statements had to the trial is questionable.[42]

The mass of detail identified by the House as supporting these accusations is, upon close examination, little more than additional smoke offered to camouflage the otherwise apparent defects in the case. The House has no material evidence against the judge that was not fairly available to the prosecutors in 1983. Indeed, the only *new* evidence is that Borders was in fact a "rainmaker" and that Dredge had a powerful motive and every opportunity to manipulate events to make it appear that Borders's false claims were true.[43] Judge Hastings was, is, and will remain innocent of these accusations. The fragmented and fragmentary evidence offered by the House is inadequate to establish the contrary view by any standard and certainly under any standard that could be applied in this case.

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[42] Memorandum: Recommendation to Decline Prosecution of United States District Judge Alcee Hastings and Patricia Williams, dated January 27, 1988, *reproduced in* H. Subcomm. on Crim. Justice, *Hearings Pursuant to a Resolution Impeaching Alcee L. Hastings, A Judge: Miscellaneous Materials*, App. V, Ser. No. 11, 100th Cong., 2d Sess., at 905-06 (Comm. Print 1988).

[43] *See* App. C at §§ I.C., I.E., II.B.1 and 2.

D. Article XVI: A Most Disclosing Accusation

Judge Hastings has denied under oath that he was the source of Mayor Clark's information, and thereby has denied the only material accusation made in Article XVI.[44] Moreover, that accusation is based upon a story that cannot be true. According to the mayor's vivid accounts, the disclosure took place *after* Judge Hastings had completed his keynote address to the Metro-Miami Action Plan Conference on September 6, 1985. According to the mayor's oft-repeated version, *after* the speech, the judge came down from the podium, into the audience, and whispered to Clark, "Stay away from Kevin Gordon. He's hot. He's using your name in Hialeah." According to the mayor, *after* this disclosure, he returned to his office, and called Peter Ferguson, a political associate. According to the mayor, it was only *then* that he told Ferguson to call Gordon and tell Gordon the mayor wanted to meet with him at the Miami Outboard Club at noon that day. The mayor has steadfastly held to this account, and even the House could not induce him to accept the possibility of another.[45]

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[44] Rep. at 130-31, 147; Hastings, 2A 1282-84; *see also Impeachment Inquiry (Hastings): Hearing Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary ("Impeachment Inquiry")*, Ser. 11, 100th Cong., 2d Sess. App. IV (*Materials Relating to Wiretap Disclosure*) 264-65, 270 (reproducing transcript of Hastings testimony) before an Investigating Committee of the Eleventh Circuit Judicial Council

[45] Rep. at 130-31, 137; Clark, 2A 1123-24, 1132-33, 1134-36; *see also Impeachment Inquiry* at 350-51, 358-60, 364-67 (testimony of Clark) and at App. IV at 411-15, 430-34 (reproducing Clark testimony before Investigating Committee).

The mayor's story cannot be reconciled with the evidence. *By all accounts*, the judge's speech could not have ended until well after 9:30 a.m. and almost certainly ended at 10:15 a.m. The judge did not go down from the podium and into the audience; he exited to the rear through the service entrance behind the speakers' table. Moreover, the FBI intercepted Ferguson's call to Gordon, the call in which Ferguson told Gordon that the mayor wanted to see him at noon, at 8:58 a.m. -- *before* the judge's speech even began. Judge Hastings thus stands accused by a man whose story cannot be true.[46]

The accusation made and the story of its making are, however, far from unrelated to the accusations made in the first fifteen articles. The mayor was an FBI "groupie". Anthony Amoroso, the supervisory agent on Operation Apple Eye, was one of the mayor's regular golf partners. The FBI's own records show that in July 1985, two months before the alleged disclosure, H. Paul Rico, the former agent who played the part of Frank Romano in Operation Apple Eye, told an intermediary for Peter Ferguson and Mayor Clark to call Tom Dowd, another FBI agent the mayor had befriended, to inquire whether the mayor and Ferguson were under investigation. Moreover, the FBI's interest in Hialeah zoning was routinely being reported in the Miami press. The mayor had sources of information, but Judge Hastings was not one of them.[47]

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[46] Rep. 130, 136-37; Vickers, 2A at 1271; House Ex. 182, 3A at 1618, 1627-28; *see also* Hastings, 2A at 1284; Vickers, 2A at 1266-73; Phillips, 2A at 1389; House Ex. 189, 3A at 1671; Resp. Ex. 58-73, 3A at 2575-84.

[47] Rep. at 143-45 (and references cited there).

The very alacrity with which the FBI seized upon the claim that Judge Hastings was the source should enhance the concerns created by the design, implementation, and premature termination of Operation Apple Eye. The studiousness with which the FBI failed to explore alternative sources when its agents learned the mayor's account could not be true and when they failed to find any corroborating witnesses for an encounter that allegedly occurred in the presence of some 800 people compounds the concerns. The vehemence with which the FBI objected to the Justice Department's preliminary decision not to prosecute the case should lay the matter to rest. The accusation that the judge was the source of the mayor's information is false, and the vigor with which it has been pursued provides strong support for the view that the judge is the victim of an improper vendetta.[48]

The presence of this accusation in this case should satisfy any Senator who is in doubt that this is a case built on suspicion. Confronted with the impossibility of the mayor's story, the managers seize upon the fact that the judge, the mayor, and Monsignor Bryan Walsh had exchanged greetings before the speech. They would have the Senate infer that this is when the disclosure occurred.[49] Nowhere, however, do they acknowledge that it was a painfully honest Alcee L. Hastings, rather than a diligent FBI, who first reported the occurrence and identified Msgr. Walsh as a witness. Nowhere do they disclose that, when confronted with this evidence, Mayor Clark disclaimed any recollection and denied that any disclosure had been made at that time.[50]

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[48] *Id.* at 141-45 (and references cited); *see also* Resp. Ex. 50, 3B at 2513-34 (FBI telex objecting to Justice Department decision). That such evidence is present in a case of impeachment brought against a federal judge should be a matter that bears heavily on the deliberations of every Senator. The central purpose of the constitutional guaranty of secure tenure was to insulate judges from executive power so that they could adjudicate disputes between citizens and the government with complete independence and impartiality. Whatever the motivation, the record in this case is replete with evidence of conduct by executive branch employees that should never be tolerable in a case involving a federal judge.

The House is forced to adopt an argument on this article that conflicts with its agreement on the prior fourteen arguments. The House argues even honest witnesses make mistakes, citing the testimony of Agent Mazzella.[51] The judge agrees. The argument is misplaced, however. It is properly addressed to the accusations made in Articles X-XV. Those were the kinds of mistakes an honest man might be expected to make during the course of extended examination and cross-examination. It cannot be used to salvage the false story of Mayor Clark. His inaccuracies were not limited to questions of timing. His graphic and detailed description of the scene and the events that occurred were false on every point.

The evidence that the House offers in support of this accusation and the particulars of the investigation that generated it are revealing. What they reveal is the zealousness of the judge's accusers and the length to which they will persist in generating the smoke of suspicion in hopes that Senators may be blinded into assuming that it may conceal a fire of guilt. What they also reveal is the essential honesty and integrity of Alcee L. Hastings, the man and the judge. Since 1983, the FBI, the judicial investigating committee, and the House have expended untold millions of dollars and human resources searching for something, anything, that might corroborate their view that this was somehow a man unworthy to be a judge and undermine confidence in the jury's verdict. Mayor Clark and four misidentified telephone numbers were the best that they could do because there was nothing to find. The jury was correct: Alcee L. Hastings is an innocent man and a worthy judge deserving of the high regard accorded him in the community he serves.

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[49] House Mem. at 154-56.
[50] *See* notes 45 and 46 above.
[51] House Mem. at 154-55.

E. Article XVII: Surplusage and Piling On

Article XVII is surplusage. That article realleges the central accusations made in the prior sixteen articles -- that Judge Hastings was a participant in Borders's corrupt 1981 scheme (article I), that Judge Hastings presented false testimony and fabricated evidence at his 1983 trial (articles II-XV), and that it was Judge Hastings who was the source of Mayor Clark's information (article XVI). With a rhetorical flourish, the House realleges these in the conjunctive, claiming it can show that the judge is guilty of all three accusations. Thus, only those Senators who had voted to convict on *each* of these substantive accusations could fairly vote to convict on the seventeenth article. But if Judge Hastings were convicted on *any* of the prior articles, he would have been removed from office, and further votes would be like the article itself -- mere surplusage and piling on.

This "catch all" might be dangerous surplusage in this case if Senators do not clearly understand the reasons why it is particularly inappropriate in this case. This is not a case like the *Ritter* impeachment where a judge was accused of unrelated offenses involving different cases and where the evidence reflected a judge whose on-going conduct raised concerns about his ability as a judge.[52] The Senate's apparent embarrassment with its decisions in that case should serve as a caution against "catch-all" articles in any case.[53] But whatever the justification for allowing votes to cumulate in a case like that, there is no justification for such a verdict in a case like this.

This is an able judge respected in his own community. The House has, in essence, made only one colorable charge -- that the judge was a participant in Borders's corrupt scheme. Only those Senators who have observed the crucial testimony and studied the record with sufficient care and have found proof establishing near certainty of guilt could fairly vote to convict and then only on the specific offense. The House's attempt has fallen woefully short of providing evidence of the kind that would be necessary to satisfy any proper standard, let alone the standard that should be observed in a case like this. This is surely a case in which the House should not be permitted to achieve by indirection what it has failed to justify directly.

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[52] *Proceedings of the United States Senate in the Trial of Impeachment of Halstead L. Ritter, United States District Judge for the Southern District of Florida*, S. Doc. 200, 74th Cong., 2d Sess. at 5-14 (original articles presented), 32-36 (amended articles presented) [accusing violations improper payments to and from former law partner (article D); oppressive and improper judicial conduct (article II); practicing law after appointment to bench in two matters (articles III and IV); tax evasion for two years (articles V and VI); and oppressive action in two cases, and improper acceptance of gratuities, and "catch-all" clause (article VII). Even in *Ritter* the House made additional allegations rather than merely incorporating prior accusations in catch-all article.

[53] *Id.* at 628-37 (votes acquitting on first six articles), 637-38 (vote to convict 56 to 28 on article VII), 638-41 (ensuing debate), 641 (unanimous vote *not* to impose sanction of disqualification from holding office in future).

III. STATEMENT OF THE ISSUES AND CONCERNS AND THE ESTABLISHED PRINCIPLES THAT SHOULD BE APPLIED

A. More on the Standard of Proof: A Degree of Certainty Commensurate with the Occasion

Whatever the proper standard in other cases, surely no Senator could properly vote to convict in a case such as this unless he or she was satisfied to a near certainty that the circumstantial evidence establishes guilt and forecloses all plausible hypotheses of innocence. That conclusion is compelled by a consideration of the nature of the accusations made and of the special circumstances present in this case. There are additional grounds that provide further support for that view.

As a pragmatic matter, Senators should also recognize that standards of proof cannot be defined or applied with absolute precision. They are guides to assist the fact-finder in reaching a judgment. Even within a standard, the degree of probability required may vary. In this context, Lord Denning's formulation of the English view may provide some guidance:

> The difference of opinion which has been evoked about the standard of proof in recent cases may well turn out to be more a matter of words than anything else. It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. As Best, C.J., and many other great judges have said, "in proportion as the crime is enormous, so ought the proof to be clear." So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion.[54]

The view taken is consistent with the American view as expressed by former Chief Justice Burger and with the dictates of common sense.[55]

This is an occasion on which the House accuses an extraordinary man of heinous crimes and asks the Senate to convict and consign to infamy an able judge whose integrity and honesty remain unquestioned by those who know him best and must trust him most. Its managers ask the Senate to take this action on the basis of circumstantial evidence that is fragmented, fragmentary, and stale and the testimony of convicted felons, evidence of a kind and quality that was unanimously rejected by a jury of the judge's peers more than six years ago when it was still fresh. Surely this is an occasion that would require something approaching near certainty, based upon a careful study of all the evidence, before any Senate could vote to convict.

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[54] *Bater v. Bater [1951] L.R. (P.D.) 35, 36-37.*

[55] *See, e.g., Addington, 441 U.S. at 424-25.*

Senators may find some further guidance in assessing the degree of certainty upon which they should insist on an occasion such as this by considering the question in the larger contexts in which it is likely to be raised. For example, how will history and those who study the matter in the future assess the judgment of the Senate in this case? Would they conclude that the interests of fairness and justice rightly combined with the requirements necessary to confirm the independence of other federal judges to require that the Senate reject circumstantial evidence of the kind and quality presented here as a basis for repudiating either the judge or the verdicts of those in the community he served? Or would they conclude that the evidence of guilt was so "overwhelming" that the Senate was justified in overriding the verdict of a jury and consigning to infamy an extraordinary man whose reputation in the community he served had withstood the test of adversity and survived intact?

History will also judge whether overall these proceedings have lived up to civilized standards of due process. The judge has gone out of his way to thank the Impeachment Trial Committee for the care and the courtesy with which it conducted its hearings. But that is only one episode in an eight-year marathon. Of the many grounds for complaint about the fairness of the procedure overall, one stands out: At every stage the judge has had to counter the massive resources of money and personnel of the State out of the modest resources available to him, backed by the assistance of a small group of volunteers who believe in him and his cause. As a result his financial security has been destroyed; his health impaired; eight years of his life consumed; and his future irreparably damaged. What will the verdict of history be on that as an example of American due process?

The question can be formulated variously. The point that bears emphasis is that this case of impeachment is a special occasion in the history of the Senate and the nation. What every Senator must decide is whether the fragmented, fragmentary, stale, and circumstantial evidence submitted by the House has established guilt with a degree of certainty which is "commensurate with the occasion." Surely, the evidence presented here falls far short of satisfying any standard that could comport with the requirements of this occasion.

There is a further point that should be recalled because it bears upon the nature of the occasion and a proper assessment of the arguments advanced by the managers as advocates for the House. The history of impeachment trials in the Senate should caution Senators to view claims by House managers that the evidence is "overwhelming" in any case of impeachment with a healthy degree of skepticism. The House had prosecuted to judgment nine cases of impeachment against federal judges prior to the present case.[56] In each, its managers zealously argued that the evidence overwhelmingly merited conviction. The Senate judged otherwise in four of those cases.[57] Even that figure is misleading. The House has prosecuted only five truly contested cases against district court judges who were not burdened by a prior conviction or other significant disability.[58] The Senate repudiated the managers' claim in three of those four cases and convicted in only one.[59]

That record confirms the wisdom of the framers that trial in the Senate would afford those most vulnerable "a tribunal sufficiently independent . . . [with] *confidence enough in its own situation,* to preserve unawed and uninfluenced the necessary impartiality between an *individual* accused, and the *representatives of the people, his accusers*[.]"[60] That record should caution against uncritical acceptance of the House's claims and views in this case of impeachment. In any fair view, the inferences marshalled by the House are attenuated at

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56. *Pickering* (1803-04), *Chase* (1804) *Peck* (1830-31), *Humphreys* (1862), *Swayne* (1903-05) *Archbald* (1912-13) *Louderbach* (1932-33), *Ritter* (1933-36), and *Claiborne* (1986). *See Report of the House Committee on the Judiciary: Impeachment of Walter L. Nixon, Jr.*, H. Rep. 36, 101st Cong., 2d Sess. 6-11 (concise history with citation to more detailed sources).

57. *Chase, Peck, Swayne*, and *Louderbach*. *See id.*

58. The four: *Peck, Swayne, Louderbach*, and *Ritter*. The others: *Pickering* (arguably insane), *Chase* (Supreme Court Justice), *Humphreys* (tried *in absentia*); *Archbald* (Circuit Judge), *Claiborne* (criminal conviction). *See id.*

59. Acquittals: *Peck, Swayne,* and *Louderbach;* convictions *Ritter*. *See id.* If a case of impeachment against a circuit judge is considered comparable to one involving a district judge and Archbald is considered, the record is two convictions in five cases of impeachment.

60. *The Federalist No. 65,* 441-42 (Hamilton) (Cooke ed. 1961)*; emphasis in original.*

best, and the evidence is far from "overwhelming." The evidence can be marshalled to cast suspicion on the judge, but it also leaves doubt, considerable doubt about the conduct of his accusers. Under any fair standard, this is an occasion in which it is the accused who is entitled to the benefit of any doubts that remain.

B. The Nature of the Evidence and Its Defects

The procedures established in this case should not obscure from any Senator's view the nature and quality of the evidence the House asks the Senate to rely upon as a basis for accepting its views. The House asks the Senate to focus upon the events that occurred in a single case handled by a judge with one of the heaviest case loads and busiest extra-judicial schedules in the nation. Eight years after the fact, its managers have submitted a significantly incomplete compilation of telephone and travel records. In their view, if the events and the records are compared in isolation, a pattern can be constructed that supports the attenuated chain of inferences necessary to justify their accusations that the judge was involved in Borders's corrupt activities and that the innocent explanations the judge provided at his 1983 trial and here were false.[61]

The Report of the Impeachment Trial Committee, however, makes it clear that the evidence can be effectively marshalled to support the judge's claim that he is innocent. The judge has firmly proclaimed his innocence here, as he has throughout the past eight years. His direct testimony provides plausible and innocent explanations for data that the House has compiled and presented. The judge's testimony has been independently corroborated on crucial points by witnesses whose credibility has not been and cannot fairly be questioned. Moreover, even at this late date, it is clear that available data can also be marshalled to support plausible accounts showing how Borders might have obtained information about the *Romano* case and concocted his scheme without the judge's knowledge or involvement. The Report makes it clear that there are several possible views that might be taken of the evidence that remains, and no Senator should be misled by the House's claims to the contrary.[62]

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[61] Rep. at 12-13, 16, 34-40, *passim*.

Senators must also take careful account of the credibility of the witnesses in assessing the weight given to the House's circumstantial claims. To shore up its house of cards, the House asks the Senate to credit the incredible. For example, the only significant corroboration provided for the House's revised theory that the conspiracy began in the first half of 1981 came from William Dredge. After some fifteen hours of guided and careful study,[63] Dredge was able to provide a near-perfect story of his dealings with Borders, a story that conformed precisely to the hypotheses the House had reconstructed from the available records. This was the same Dredge who had been a career criminal for forty years.[64] This was the same Dredge who had lied to his criminal associates so well that they accepted his claims even as he was betraying them.[65] This was the same Dredge who lied to the FBI in order to obtain a deal that made it possible for him to avoid prison for his admitted drug dealing.[66] This is the same Dredge who, if he is to be credited here, lied under oath to the committee of five judges who first made the charges.[67]

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[62] Rep. at 10-11.
[63] Dredge, 2A at 107-08.
[64] House Ex. 218, 3B at 1789-1834; Resp. Ex. 6, 3B at 2336-43.

The House was compelled to rely upon other witnesses whose testimony was similarly incredible. They must be seen and the demeanor compared with that of witnesses who appeared and offered evidence in favor of the judge's case. To see Mayor Stephen Clark and cronies such as Glenn "Wedge" Whittle is to disbelieve them.[68] The House now admits that the mayor's oft repeated story, as-detailed-and-firm-as-Dredge's, of how the alleged wiretap disclosure took place is false.[69] The concession comes late in the day and only because the accused has proved what should have been obvious from the day the story was first told -- it could not be true. The House asks the Senate to accept the false story as evidence that the judge made the disclosure and to infer that he made it at a time and in a manner that the mayor flatly denies.[70] The argument and logic are worthy of Alice in Wonderland; they cannot be accepted here.

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[65] Dredge, 2A at 160-62.
[66] Resp. Ex. 10, 3B at 2367, Resp. Ex. 11, 3B at 2372-76.
[67] Resp. Ex. 2, 3, 3B at 1994-2148, 2149-2172 *passim*.
[68] Clark, 2A at 1122-50 *passim*, Whittle, 2A, 1334-1347 *passim*.
[69] Rep. at 129.
[70] *Id.* at 129, Mazzella, 2A at 1226-30.

The House's presentation of the evidence may dilute the attention that should be directed at the testimony of incredible witnesses such as these because it was interspersed with accounts of FBI agents and former government attorneys, such as:

-- William Murphy, the Javert-like agent who designed and managed a failed "Operation Apple Eye" and who has since devoted eight years to aiding those who joined in relentless pursuit of his quarry and whose recollection even today is superb, except on matters such as what was said by whom in the critical hour following Borders's arrest;[71]

-- Anthony Amoroso, the retired undercover agent of Abscam fame and notoriety, the supervising agent for Operation Apple Eye, a supervisor who assigned agents to work on the investigation that touched upon Mayor Stephen Clark, and a regular member of Mayor Stephen Clark's golf foursome, who remembered well what he had not done, but was vague on what he had, and who acknowledged, reluctantly, the obvious fact that successful undercover agents must be able liars;[72]

-- Christopher Mazzella, the experienced undercover agent who assumed the judge's guilt in 1985 and set out to make a case, who was outraged when his efforts failed, who lied to the judge and the House, and merely repackaged his story when confronted with truth;[73]

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[71] Murphy, 2A at 243-393.

[72] Amoroso, 2A at 1354, 1355, 1361, 1364-65.

[73] Mazzella, 2A at 1199-1239 *passim*, 1175, 1218-1220, 1235-36; Amoroso, 2A at 1383-84.

-- James Deichert, the Strike Force attorney who had decided the judge was guilty before the investigation was complete, who wittingly or unwittingly acted to provoke a timely issuance of the *Romano* order, and who in 1989 *first* recalled the great surprise he had felt in 1981 when Judge Hastings accepted his arguments and the probation office's recommendation in sentencing the Romano brothers to modest terms of imprisonment.[74]

The House asks Senators, as it must, to accept the truth of the accounts provided by witnesses such as these as concrete that provides a proper foundation for the house of cards it would construct. In that view, only the credibility of Alcee L. Hastings, the man whose reputation for honesty and integrity is so strong that it has survived the on-going assaults of the past eight years, is in issue. That view is wrong.

No Senator may fairly consider the House's claims and views without carefully comparing the credibility of the witnesses upon whom the House relies with that of those who came forward in response to calls from its managers as well as on the judge's behalf, witnesses such as:

-- Jeffrey Miller, the law clerk who was there and whose testimony independently confirms the judge's account of the events in the *Romano* case;[75]

-- Jesse McCrary, Jr., the lawyer whose career parallels the judge's, the lawyer of stature and integrity, whose testimony confirms the judge's account of the events of September 12 and whose opinions confirm the respect the judge has earned in the community he has served;[76]

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[74] Deichert, 2A at 43-44, 51-52, 57-58, 59.
[75] Miller, 2A at 611-75 *passim*.

-- Neal Sonnett, the former prosecutor and current member of the ABA House of Delegates and president-elect of the National Association of Criminal Defense Lawyers, who entered the *Romano* case late in the day, who corroborated the judge's account of critical events, and who, after eight years of reflection, remains persuaded that the judge is innocent.[77]

Every Senator must also assess and compare the credibility of those who know the judge and his reputation best to determine the weight their views should be given in assessing the credibility of the judge and in weighing his testimony against that of his accusers, witnesses such as:

-- The Honorable James Lawrence King, chief judge of the court on which the judge has served;[78]

-- The Honorable Henry Latimer, the former judge who served with Judge Hastings on the state court bench and who has known the man and his reputation over the years;[79]

-- The Honorable Edward Rogers, the state court judge who has known the man for years and is thoroughly familiar with his reputation;[80]

-- Martin R. Raskin, the chief of the criminal division in the office of the United States Attorney for the Southern

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[76] McCrary, 2A at 1448-79 *passim*.
[77] Sonnett, 2A at 173-76, 195-233 *passim*.
[78] King, 2A at 1240-1259 *passim*.
[79] Lattimer, 2B at 1702-1715 *passim*.
[80] E. Rogers, 2B at 1715-1722 *passim*.

District of Florida at the time the accusations were made and a lawyer who prosecuted a major and sensitive case before the judge and who is now an active member of the trial bar;[81]

-- David Thomas, the young man who attested, in a halting voice, who Judge Hastings was and what he meant to those who were young and black in South Florida.82

These are judges, lawyers, and citizens who were called to testify in 1989. These are judges, lawyers, and citizens whose opinions remain unchanged eight years after the events and six years after the verdict. These are witnesses who attested to a reputation so secure that it has remained unshaken among those who know the man best and must trust him most. These are witnesses of unquestioned integrity who should be seen and whose views should be heard and given great weight by every Senator.

C. The Nature of the Procedures Employed and the Resulting Record

The evidence in this case was, for the most part, presented through witnesses who could be examined and cross-examined. The credibility of the accounts they provided could be explored; the events shown by the testimony or records could be set in the context in which they occurred. The Senate now has before it the diligent report of its Impeachment Trial Committee and the voluminous record compiled in the proceedings before that committee. The danger remains, however, that events may be isolated from their contexts and presented

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81. Raskin, 2B at 1891-1903 *passim*.
82. Thomas, 2A at 430-32.

in a manner that unfairly invites the marshalling of data without regard for the credibility of the source or the context established by the explanation through which it was presented. That is precisely what the post-trial memorandum submitted by the House strives to achieve.

There are further dangers that stem from the fact that the evidence is incomplete. Witnesses whose testimony would have aided Judge Hastings have died or become incompetent. Records that would have enabled him to supplement and complete the records from which patterns are being discerned and tested have been destroyed.[83] What remains are only scattered pieces of the puzzle and only those pieces which the judge's accusers elected to seek and preserve.[84]

Incomplete data invites speculation. The scattered pieces of the puzzle that remain in this case can be arranged to confirm that the true picture is a "Mona Lisa of innocence." They can also be rearranged so the shadowy outline of a "dragon of guilt" may be discerned. But to see either the picture of a Mona Lisa or outline of a dragon requires the viewer to speculate about the pieces that are missing as well as those that remain. The number of pictures that can be portrayed increases as pieces of the puzzle are lost or removed from the board. The number of stories that can be concocted from the available data is inversely proportional to the completeness of that data.[85]

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[83] *See* App. B. (for identification of unavailable witnesses and records and summary analysis of consequences to judge); *see also* Detailed Statements and Analyses of the Evidance and the Managers' Arguments, App. C. (for specific illustrations).

[84] *See, e.g.,* App. B at 9-10 (summary of prior investigations).

This is a case in which both sides are marshalling the fragmented and fragmentary data that remain. Two examples may illustrate the point. The House, for example, would construct a theory of guilt based upon one telephone call of three minutes or less, six calls of a minute or less, and five message slips that evidence contacts or attempted contacts between the judge and Borders over a period of more than three months from February 20 to May 29.[86] In contrast, it is clear that the incomplete data available concerning Dredge's and Borders's contacts can be marshalled to create a plausible account that supports the theory of innocence and raises further doubt about the conduct of those who conducted the prior investigations.[87] Given the state of the data, attempts such as these are and can be no more speculative enterprises.

The burden was on the House to demonstrate that the pieces that remain could only be arrayed in a manner that decisively portrayed a "dragon of guilt." The House may not properly ask Senators to speculate upon the pieces that are missing and to draw inferences as if they were there. That, however, is precisely what its managers have been compelled to do because the evidence that remains is no longer adequate to do otherwise. The fact that the pieces that remain are consistent with the Mona Lisa of innocence and can be marshalled to cast doubt on those who controlled the board precludes Senators from accepting speculations such as those upon which the House's case rests. Senators should recognize the principle and the danger because, absent caution, the voluminous record and the House managers' analyses might create a false sense of completeness and induce those who study it to ignore plausible facts that might have been shown at an earlier stage.[88]

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[85] *See, e.g.,* Kemmelman, *The Nine Mile Walk, American Mercury* (1947), *reproduced in* Bellows and Moulton, *The Lawyering Process* at 273-80 (1978) (for an illustration of the point).

[86] Rep. at 52-54; House Mem. 39-40; App. C at § I.B. 1, II.A. 1-7.

[87] *See* App. C at § II.B.1-2 (for development of the point).

The Report of the Impeachment Trial Committee illustrates the problem. As the Committee reported, much of the underlying evidence is not in dispute. The disputes arise over how the data that remain should be marshalled and what inferences should be accepted.[89] The data can be marshalled to construct a plausible circumstantial account that fairly explains the data and corroborates the judge's testimony and claim that he is innocent.[90] The data which remains can also be marshalled to construct a circumstantial story that suggests the judge was a guilty participant in Borders's corrupt scheme and that his denials and explanations were false.[91] What must be made clear here is that this is not a case which merely involves a choice between stories constructed from incomplete data.

The burden of proof was and remains upon the House. The House undertook to prove that the judge was guilty; it is not for the accused to prove his innocence. The fact that plausible accounts consistent with the judge's innocence remain should dictate the outcome in a circumstantial case such as this. The House has failed to satisfy the burden of proof it assumed.

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[88] *See* App. B and App. C, generally, (for concrete illustrations).

[89] Rep. at 9-10.

[90] Rep. at 16-20.

[91] Rep. at 12-16.

The House would never bring a case if there were not substantial grounds for suspicion. If the independence of the judiciary is to be maintained, however, the burden must be placed and firmly kept upon the House. The House must prove a judge's guilt of the accusations it has made. It is the accused who must be given the benefit of any doubt that remains.

The point is crucial in this case of impeachment. It was the FBI's decision to arrest Borders at the scene of the payoff that assured that this was a case in which circumstantial evidence would remain that could forever be marshalled to cast suspicion on the judge. It was the FBI's and, in some degree, the Investigating Committee's decisions:

> (1) *not* to obtain any of Pride's phone records, all of Borders's phone record, any of Nesline's phone records, more of the L'Enfant Plaza's records or the AT&T records necessary to verify those that were obtained; and
>
> (2) *not* to take further steps to compel Nesline's testimony or investigate further his report that the judge was innocent; but
>
> (3) *instead* to gather only those records and that testimony likely to support their hypotheses of guilt

that assured that the data that remained eight years after the fact could be marshalled to enhance the suspicion on the judge and that any effort by the judge to gather conflicting data or testimony would be handicapped beyond repair.

The House has done an able job in marshalling data to demonstrate the grounds for suspicion that remain and can never be fully dispelled. The judge has confronted the evidence again, proclaimed his innocence, and marshalled the data to make it clear that what remains is only suspicion, suspicion created by others and suspicion of a kind that no one in his position could ever dispel.

In reality, the House's position is that, where evidence can be marshalled to cast suspicion on a judge, the burden should shift to the judge to prove his innocence and remove any grounds for reasonable doubt. This is a burden that neither this judge, nor any judge in his position, could satisfy. Maintaining the independence of the courts requires a vastly different principle in cases of impeachment. Suspicion can never be enough.

The evidence invites speculation and may be marshalled to cast suspicion. But, when there is very little evidence, it is not difficult to create seemingly plausible scenarios by filling in the gaps with speculative inferences and unwarranted juxtapositions, as in the case of the prosecution's so-called "Master Chronology", which is more full of holes than a piece of Swiss cheese.[92] The prosecution has built up a single scenario from these fragmentary pieces. It is largely speculation. Upon close examination, the evidence does not fairly establish guilt on any article, even by a preponderance of the evidence. The evidence is manifestly neither clear nor convincing and certainly not unequivocal. Replete with speculation and doubt, it cannot satisfy the test of beyond reasonable doubt. The evidence does not prove anything, let alone prove the judge's guilt by any standard and surely not with the degree of certainty commensurate with the requirements that must be observed in a case like this.

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[92] *See* App. C. at § II (for analyses illustrating the holes).

D. The Nature of Due Process and Its Application in This Case of Impeachment

In a different setting, Justice Frankfurter captured the essence of the reasons why the principles of due process are so important:

> The validity and moral authority of a conclusion largely depends upon the mode by which it was reached. . . . [No] better way [has] been found for generating the feeling, so important to a popular government, that justice has been done.[93]

History will consider the mode by which the proceedings against Alcee L. Hastings have been conducted in assessing the validity and moral authority of the decisions that have preceded the issue now before the Senate. History will have to look to the judgment of the Senate in reaching its verdict on whether justice was finally done.

In March, the Senate rejected the view that the presence of a jury acquittal and the lapse of more than five years should preclude, in principle and as matter of law, the Senate from conducting a trial on essentially the same accusations.

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[93] *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 171-72 (1951) (concurring opinion).

That decision neither foreclosed consideration of, nor relieved Senators of their right and duty to consider how, those same principles should be applied once the evidence was before the Senate. That evidence is now before the Senate, and it remains for each Senator to determine how the purposes that inform those principles can be satisfied in this case of impeachment.[94]

The record now before the Senate establishes the essential facts that bear upon the proper application of those principles. Both the evidence and the accusations are essentially the same. Six years of exhaustive investigation and scrutiny have produced nothing new of substance. The State, in all its branches, has marshalled its resources to make a second attempt. Those efforts have exposed the judge to embarrassment, expense and ordeal, forcing him to live in a continuing state of anxiety and insecurity.

As a result of the disproportion in resources and lapse of time, the record is unfairly biased. The State's resources have been employed to gather, develop, and preserve additional detail and recollections that might be marshalled to support the main accusations and to undermine confidence in the explanations the judge provided in 1983. The passage of time and the absence of resources have resulted in the destruction of records, the death of witnesses, and the loss of recollections through which the judge might have countered in kind. The now established circumstances are inconsistent with the fundamental conceptions of justice, fair play, and decency upon which the principles are founded.[95]

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[94] *See* 135 *Cong. Rec.* S. 2804 (March 16, 1989) (explanatory statement by Senator Specter).

The House has acknowledged throughout that cases of impeachment must be governed by principles of due process. The question this case poses is how those principles should be applied to strike a proper balance between the need to protect the security that is at the core of judicial independence and to respect the rights of the accused as an individual and the need to assure the accountability that is central to maintaining the integrity of the courts. While the Senate may reasonably insist that the balance be struck on the merits in each case, the record here dictates how the balance must be struck in this case of impeachment.

Judge Hastings has been held accountable in full measure, and in the views of those who know him best and must trust him most, he poses no threat to the integrity of his court or any court. On the contrary, he *is* an able judge whose reputation for honesty and integrity has survived intact. The case against him *was* and *remains* circumstantial. The suspicions that can never be dispelled *were* created by others -- by the decision of the FBI to arrest Borders at the scene and the subsequent relentless pursuits to find evidence that might corroborate those suspicions.

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[95] *See, e.g., Green v. United States*, 355 U.S. 184, 187-88 (1957), and *United States v. Lovasco*, 431 U.S. 783, 789-90 (1977) (identifying the core policies and fundamental conceptions that inform the application of due process principles to circumstances such as these).

A circumstantial case of this kind is one that in its nature forever leaves open questions that will be troubling. Some may see evidence of guilt in the tea leaves of circumstance, and, for them, the accused's denials and explanations will forever seem hollow and false. Some will believe the accused and his explanations and will forever question the motives of those who set out to create, and to prosecute on the basis of, the appearances shown only by circumstantial evidence. Many will be troubled simply because there are questions that can never be resolved with certainty.

The questions raised and the suspicions established by the evidence that the House has marshalled can never be resolved with certainty. They have been resolved once by a jury. That jurors sat in a federal courtroom for more than two weeks. They observed the responsibility society assigns every district judge and its exercise. They must have been aware of the stakes, and their measure of the accused as a man must have in some degree been informed by their view of him as a judge. Senators must now determine the same issues in a case in which the focus is upon the accused as a judge, but that determination must also, in some degree, be informed by their view of him as a man.

In this view, the proper outcome should be clear. The demands of due process and judicial independence combine to insist that an accused judge be afforded the necessary protection. The Senate must insist that the House fully discharge its heavy burden of proof, the burden of proving guilt to the high degree of certainty that must be required. The Senate must not permit it to employ suspicion, even strong suspicion, as a vehicle for reducing the standard or shifting the burden under the guise of a claim that a concern for judicial integrity justifies the resolution of suspicion and doubt against the accused in all cases of impeachment. The Senate has never accepted such a view in any case of impeachment, and surely such a view would be intolerable in this case of impeachment.

Those principles require an acquittal here. The House has ably marshalled the available data to create suspicion, perhaps in the view of some considerable suspicion and even troubling doubt. The judge cannot and could never fully dispel the suspicions or resolve the doubts that will remain in the minds of some. But that was not and could never fairly be his burden. The burden was upon the House, and it has failed to discharge it by any standard. Surely, no Senator could except the House's speculative web as establishing guilt to anything approaching the degree of certainty that must be required on this occasion.

IV. CONCLUSION

The judge must be acquitted in this case of impeachment. The evidence is insufficient to establish guilt by any standard that could fairly be applied. *The Report of the Impeachment Trial Committee* suffices to establish that the evidence is far from clear and certainly not unequivocal. It is murky at best. For that reason, the *Report* alone provides adequate ground for any Senator to vote to acquit in this case of impeachment.

The *Report* does more. It establishes that there are material issues of fact open to genuine dispute. Surely, no Senator who has taken the special oath in this case could vote to convict unless he or she had observed the witnesses and evaluated their credibility and had studied the evidence in sufficient detail to conclude that each of these issues must be resolved against the accused. Such scrutiny is unlikely to satisfy fully any Senator. It will only confirm what the *Report* suggests -- the evidence is murky at best; far from clear or convincing; certainly not unequivocal; and only confirms the presence of substantial doubts that have plagued the case and the judge for eight long years.

The judge in this case of impeachment is an extraordinary man. He is an able judge. The reputation for honesty and integrity he had earned and has demonstrated over the past six years have been confirmed by the verdict of a jury and the confidence of those who know him best and must trust him most. The Senate should ratify these verdicts and confirm the ver-

dict that history will surely reach. The judge should be acquitted on each of the articles exhibited by the House so that he may provide to his community the full services for which he was appointed and begin the process of repairing the injuries he has sustained.

Respectfully submitted,

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[96] Although the judge has no staff to identify, he and his counsel have been aided over the years by the voluntary assistance of many who believe in the man and his cause. Three require acknowledgement here for the contributions they made in connections with the hearings before the Impeachment Trial Committee: **Sue Ann Hochberg, Esq.**, **Charles Francis, Esq.**, and **Timothy Bishop**. They all deferred their other commitments and forsook their normal pursuits. Each donated the summer of 1989 to aid the judge and his counsel and to diminish the handicaps and burdens they bore. Their contributions should be recognized and acknowledged by all.

APPENDIX A

A COMPREHENSIVE STATEMENT OF THE EVIDENCE CONCERNING ARTICLES I-XV

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Prefatory Note

The Senate must distinguish among three types of "facts" that are involved in a circumstantial case such as this. First, there are facts established by direct evidence that are not subject to genuine dispute -- *e.g.*, the fact that Borders arrived at the Sheraton Hotel at approximately 10:00 p.m. on Saturday, September 12, 1981. Second, there are disputed facts for which the direct evidence is in conflict -- *e.g.*, the conflicting testimony over whether the group was waiting for Borders to arrive at the Sheraton that evening. Third, there are facts supported by direct evidence where the dispute arises solely because one party claims that events shown by direct evidence can be marshalled to support an inference that conflicts with the fact supported directly -- *e.g.*, the House managers' claim that events can be marshalled to undermine Judge Hastings's testimony that his telephone conversation with Borders on the evening of October 5 concerned letters for Hemp that he had drafted on the bench earlier that day, or his testimony that he and Borders never discussed the *Romano* case.

Counsel has attempted to provide a comprehensive statement that includes all facts established or supported by direct evidence. Where the fact is in dispute based upon a conflict in the direct evidence, the nature and source of the conflict is identified. Counsel has included factual conclusions only where he believes the evidence and the inferences are not subject to genuine dispute -- *e.g.*, facts concerning the judge's background and reputation. Counsel has *not* included disputed factual *conclusions* where the dispute arises from one party's attempt to marshall events or other data to support an inference that conflicts with facts supported by direct evidence. This is an area that should be reserved for argument.

The House managers have offered extensive evidence showing events that respondent believes are irrelevant or immaterial -- *e.g.*, telephone records showing a portion of the actual or possible contacts between Judge Hastings and William Borders in the first half of 1981. In the interest of providing a comprehensive basis for argument, however, counsel for respondent has included the events shown, notwithstanding his views on potential for improper prejudice resulting from the admission of this evidence. He has presented these events in the context in which they occurred, rather than isolating them as the managers have attempted in their submissions. The established presumption of innocence and the traditional assignment of the burden to eliminate plausible hypotheses of innocence in a circumstantial case requires such a presentation in any event, if this evidence is to be considered at all.

In the first part, respondent presents facts concerning the backgrounds and reputations of six individuals who have emerged as significant figures in the accusations made in the first fifteen articles -- the Honorable Alcee L. Hastings, Hemphill P. Pride, II, Jesse J. McCrary, Jr., William A. Borders, Joseph Nesline, and William Dredge. The facts presented there are not, insofar as counsel is aware, subject to genuine dispute. In the second part, respondent presents a narrative chronology that reports events through October 9, 1981, that either or both parties have identified as relevant and places them in context.

I. FACTS CONCERNING SIX INDIVIDUALS WHO PLAYED SIGNIFICANT ROLES IN THE EVENTS THAT GAVE RISE TO THE ACCUSATIONS MADE IN ARTICLES I THROUGH XV

A. Alcee Lamar Hastings

1. Alcee Lamar Hastings, the respondent in this case of impeachment, was born in Altamonte Springs, Florida, in 1936. He attended public schools in that area until he graduated from high school. His parents were employed in domestic service in the homes of the wealthy outside Florida. For that reason, his grandmother assumed much of the responsibility for his upbringing until he left home to attend college. (Hastings, 2B at 2210-11)[1]

2. Judge Hastings graduated from Fisk University with a degree in biology. He attended the Howard University Law School for two years and then completed his legal education at the law school then maintained by the State of Florida at Florida A & M University. He was one of the six students in his class. He graduated and was admitted to the Florida Bar in 1963. At that time, many of the kinds of entry-level positions through which many young lawyers began their careers were not open to him. Accordingly, he went directly into private practice, initially with a high school classmate and later on his own. (Rogers, 2B at 1716; Hastings, 2B at 2211-12)

3. Judge Hastings maintained a general practice until his appointment to the state court bench in 1977. He repre-

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[1] The conventions employed by the Impeachment Trial Committee have been adopted for citing materials that appear in the printed record. Rep. at ___-___.

sented criminal defendants, including a significant number charged with capital crimes. He also handled civil litigation and commercial and real estate matters. As he characterized it, he had a "Y'all come" practice. Judge Hastings's income from practice was adequate to his needs, but was not lucrative by the standards of many in the legal profession and, indeed, was less than the judicial salaries he has received since his appointment to the bench. (Hastings, 2B at 2211-13; *id.* at 2213-14)

4. From the outset of his career, Judge Hastings was also active in civil rights matters. He brought the suit through which the Broward County public school system was desegregated; he brought or participated in most of the public accommodation suits filed in the area; and he represented two local chapters of NAACP, without fee. (*Id.* at 2211)

5. Judge Hastings was also active in the affairs of his church, his community, and other organizations. His commitments were such that he was attending one or more meetings almost on a nightly basis. (*Id.* at 2213) Over time, his reputation grew, and he was invited to speak on issues of concern throughout the country. (Resp. Ex. 139, 3B at 2910-13; Miller, 2A at 635)

6. Shortly after he entered practice, he began his own quest to open Florida's political processes to blacks by seeking office himself. Early in his career he ran for the Ft. Lauderdale City Commission (twice) and for each house of the Florida legislature. In 1970, he ran in the Democratic pri-

mary against former Senator Lawton Chiles for nomination as a candidate for the United States Senate. Thereafter he sought a seat in the Florida Public Utilities Commission. He did not win any of these contests. (Hastings, 2B at 2212-13)

7. Judge Hastings became active in Democratic Party politics even before he graduated from law school. He was an active participant in the Democratic Party in every presidential campaign from the 1960 election onward. His role in President Johnson's campaign was such that he was among those invited to meet with the President at the White House. He was one of the original five politicians in Florida who chose to support Jimmy Carter early in his quest for the presidency and, through that experience, came to know him personally. (*Id.* at 2215-16)

8. Judge Hastings's status in the profession was formally recognized in 1977. From among 79 applicants to fill a vacancy on the Circuit Court in Broward County, Judge Hastings was one of the three candidates submitted to then-Governor Rueben Askew by the judicial nominating panel for that part of Florida. Then-Governor Askew appointed him to that office where he served until his elevation to the federal bench in 1979. (*Id.* at 2214)

9. By 1979, Florida's then-Senators Lawton Chiles and Richard Stone had concurred in the establishment of a judicial nominating committee to screen candidates for the federal bench in Florida. There were more than 250 applicants for the five additional district court judgeships authorized in 1978.

Judge Hastings was one of the five persons recommended for appointment. He was nominated by then-President Carter, and, with the advice and consent of the Senate, he was appointed to serve as a United States District Judge for the Southern District of Florida. He was invested in October 1979 and assumed the duties of his office the following month. (*Id.* at 2214-15, 2216-17)

10. Judge Hastings carried a full and normal caseload on his court until the events that gave rise to his indictment were publicly reported in late 1981. Following his acquittal in February 1983, he promptly resumed the normal duties of a federal judge for the Southern District of Florida. He fully executed those duties from February 1983 until some time after the articles of impeachment that gave rise to this case were exhibited in the Senate. (King, 2A at 1243-44, 1247-48; Hastings, 2B at 2217-18)

11. The opinions of judges, lawyers, and others in the Southern District of Florida and elsewhere concerning Judge Hastings's competence and integrity were sought at the time of his initial nomination in 1979 and were presented at his 1983 trial and in the hearings before the Impeachment Trial Committee. Prior to his appointment he was uniformly regarded as a man of the highest integrity who placed service to his community and to causes he deemed important above the quest for financial wealth. By all accounts he was and has remained a man whose judicial salary was sufficient to satisfy his modest needs. (Murphy, 2A at 400; Miller, 2A at 634-36; Latimer, 2B

at 1702-04; E. Rogers, 2B at 1715-17; Perry, 2B at 1732; S. Pride, 2B at 1794; PT: Gary, 2B at 1949-52; PT: Stewart, 2B at 1959-60)

12. The judge's reputation and opinions concerning his competence and integrity among judges, lawyers, and others in his community remain unchanged in 1989, notwithstanding the charges against him and the attendant publicity. Senior trial practitioners consistently testified that he was an outstanding trial judge on the federal bench and that his reputation among experienced practitioners who appeared before him was consistent with their opinions. (Sonnett, 2A at 206-7; *id.* at 229; Miller, 2A at 636-7; McCrary, 2A at 1458; Latimer, 2B at 1702-04; Resp. Ex. 7, 3B at 2344-50) Former prosecutors, including the one who had been chief of the criminal division in the office of United States Attorney for the Southern District of Florida in 1981, testified that their confidence in his integrity, and that of other attorneys who appeared before him, remained unimpaired by the events that had transpired. (Sonnett, 2A at 206-7; Raskin, 2B at 1891-95; Resp. Ex. 7, 3B at 2344-50) The Chief Judge of the Southern District of Florida attested to the fact that Judge Hastings had been a fully productive member of the court since his acquittal and that his continuing service had contributed to the work of that court without causing any problems among his colleagues or in the operations of the court. (King, 2A at 1243-44; Resp. Ex. 56, 3B at 2553-54)

B. Hemphill P. Pride, II

13. Hemphill P. Pride, II, is a lawyer in Columbia, South Carolina. Pride and Judge Hastings met and became close friends when they both attended law school at Florida A & M University. Following graduation, Pride returned to Columbia where he became a trial lawyer. Pride and Judge Hastings maintained their friendship over the years, each acting as godfather to the other's first son. Pride met William A. Borders through his participation in the National Bar Association and, over the years, the two became friends. (H. Pride, 2A at 676-77)

14. Pride was indicted in 1977 on charges that he had improperly diverted funds from a federally financed housing project. Borders arranged to have John Shorter, a Washington lawyer, represent Pride in that trial. Later that year, Pride was tried, found guilty by a jury, and was convicted by the court and sentenced to a term of imprisonment. Pride appealed the conviction. (H. Pride, 2A at 677-78; *id.* at 707-08; Resp. Ex. 110A, 3B at 2843-45)

15. Judge Hastings and Borders continued to support Pride throughout this period. Borders gave Pride a rent-free apartment and found him a job in Washington, D.C., while his appeal was pending. Judge Hastings invited Pride to participate in his investitures to both the state and the federal benches. The judge arranged and paid for the transportation necessary to enable Pride and his mother to come to an NBA

convention in Miami in this period. (H. Pride, 2A at 707-09; *id.* at 710; Resp. Ex. 108, 3B at 2839-42)

16. Pride was not able to pay his debts. After his indictment and throughout his incarceration, his unsatisfied liabilities mounted. In addition, Pride was divorced from his first wife and was married to a second with whom he had a second child, Elliot. (H. Pride, 2A at 707-09)

17. Pride's conviction was affirmed, and he entered prison in 1980. Pride asked Judge Hastings to assist him in raising funds for a petition for post-conviction relief. Judge Hastings declined and advised him that he thought such a petition would be fruitless. The judge did send funds to Pride's family. (H. Pride, 2A at 682-84, *id.* at 710; Resp. Ex. 108, 3B at 2839-42)

18. Pride was suspended from practice by the South Carolina Supreme Court and, following his conviction, the bar initiated proceedings for his permanent disbarment. Pride opposed those proceedings. By all accounts, Pride had formed and communicated to his friends a passionate and insatiable desire to avoid disbarment and to one day regain admission to practice. (H. Pride, 2A at 677-78, 679, 710-12; Perry, 2B at 1732, 1735; Chisholm, 2B at 1889; S. Pride, 2B at 1797, PT: H. Perry, 2B at 1982-84; PT: Stevenson, 2B at 1990-2003)

19. By Pride's own admission, he formed this desire before he entered prison and persisted in it until he was finally readmitted to practice in 1985. Both Judge Hastings and Borders were aware of Pride's desire and the importance of

this goal to him. Pride acknowledged that Judge Hastings and Borders had supported him throughout. He also admitted that each had taken actions to assist him without prior consultation or approval. (H. Pride, 2A at 679-81, 681-82, 709)

20. Pride's reputation for reliability and truthfulness was ambiguous. In addition to his conviction, those who knew him reported he did not pay attention to detail, was forgetful, and regularly relied upon others for assistance. Pride was not viewed as an evil man; rather, he was viewed as careless and somewhat self-centered. (S. Pride, 2B at 1794-95; PT: M. Pride, 2B at 2178-82)

C. Jesse J. McCrary, Jr.

21. Jesse J. McCrary, Jr., is an established lawyer in Miami, Florida. He also graduated from the law school then maintained by the State of ~~Florida at~~ Florida A & M University in 1965 and was admitted to the Florida Bar in 1966. He has had a career in public service and private practice that can only be described as distinguished. He has served as an Assistant Attorney General for the State of Florida, a member of its Industrial Relations Commission and its Constitutional Revision Commission, and as its Secretary of State. He is an experienced litigator and trial lawyer. (McCrary, 2A at 1448-50; Resp. Ex. 132, 3B at 2901-06)

22. Mr. McCrary met Judge Hastings in law school, and the two men have remained close friends since that time. Mr. McCrary also met Hemphill Pride in law school and maintained his association over the years, primarily through activities

and meetings of the National Bar Association. Through the National Bar Association, Mr. McCrary also met and became friends with William Borders. (McCrary, 2A at 1449-50, 1457-58)

D. William A. Borders

23. William A. Borders attended law school at Howard University and, following his graduation, entered practice as a criminal defense lawyer. He was active in both the National Bar Association and the Democratic Party. He became president-elect of the NBA in mid-1979 and served as president from mid-1980 to mid-1981. During the Carter administration, he served as a member or advisor to the Democratic National Committee and its Finance Committee. He was viewed as having and probably had a substantial role in advising the then-President and Attorney General on minority candidates for the federal bench. In 1980, President Carter appointed Borders to serve a five-year term as a member of the District of Columbia Judicial Nominating Commission. (C. Rogers, 2A at 849, Duncan, 2B at 1846-47; Selig, 2B at 1849-50; Chisholm 2B at 1882-83)

24. Borders and Judge Hastings met early in their careers through their activities in the National Bar Association and the Democratic Party. Their friendship arose and developed from their shared interests in the affairs of the NBA and their political activities in the Democratic Party. Neither ever referred clients to, or worked on legal or business matters with, the other. (Hastings, 2B at 2433-34)

25. By all accounts, until October 9, 1981, Borders was uniformly viewed by persons in public office, persons prominent in the Democratic Party, and lawyers in private practice as an ambitious young lawyer who had risen to prominence in his profession and in the Democratic Party. Until that time, he was uniformly viewed as a man of integrity and honesty. (Duncan, 2B at 1846-47; Selig, 2B at 1849-50; Chisholm, 2B at 1883-85). Judge Hastings has consistently testified that that was the view he held until he learned of Borders's arrest and details concerning his activities (Hastings, 2B at 2424-25, 2438-39).

26. Borders also had characteristics and engaged in practices that were noticed by many. He was cryptic in his conversations (Duncan, 2B at 1847; Resp. Ex. 2 at 2095-96; PT: Cunningham, 2B at 1930-31; PT: Gary, 2B at 1939-41, 1944-45). He regularly met friends and associates from out-of-town at the airport and sought reciprocal courtesies when he travelled (PT: Stewart, 2B at 1960-62). He was secretive. He preferred to make calls from pay telephones and asked others to do the same, even those in prominent political positions (Chisholm, 2B at 1883-85; Resp. Ex. 2 at 2095-96; PT: Stewart, 2B at 1962-63). There is no evidence that these characteristics and practices excited suspicion among his friends and associates in politics or in the profession prior to his arrest.

27. By all accounts, there was a side of Borders that went undetected until after his arrest. He was a criminal defense lawyer with no files (C. Rogers, 2A at 849). Although

he did not represent him, he associated with Joseph Nesline, a reputed underworld figure and gambler in Washington, D.C., and may have been a gambler himself (Dredge, 2A at 77, 78, 89-91). Among criminal associates, he held himself out as having the power to fix cases before judges other than Judge Hastings (Dredge, 2A at 112; Robinson, 2B at 1844; Resp. Ex. 13, 3B at 2377-80). None of his claims with respect to other judges has ever been viewed as credible by the authorities. There is no evidence in the record to show Borders's financial condition or needs in 1981 when the relevant events took place.

E. Joseph Nesline

28. Joseph Nesline lived in the Washington area and was viewed as one of its most significant underworld figures until some time in 1986. He was reputed to be a gambler who had once had interests in casinos overseas. He was reputed to have connections with members of organized crime throughout the underworld, including members of the Genovese family. He had reportedly done business in South Florida with members of the Genovese family and others, and he was acquainted with Santo Trafficante, a reputed organized crime figure residing in Tampa, Florida. (Shull, 2B at 1822-25; Robinson, 2B at 1837-38)

29. By all accounts, Nesline was a central figure in Borders's schemes to solicit bribes. According to William Dredge, Nesline introduced him to Borders and Santo Trafficante stayed in Nesline's apartment when he was seeking to meet with Borders. Nesline's testimony has never been ob-

tained, and a 1985 investigation that might have gained information about Nesline's and Borders's relationship and dealings was not pursued.

30. It is no longer possible, however, to determine Nesline's precise role in these transactions or to obtain the information about this case that he must have had. Nesline's last encounter with the criminal law came in 1986, when he was found competent to enter a guilty plea. The parties have submitted information showing and have stipulated that Nesline had since become incompetent and was no longer competent to testify at the time the hearings were conducted in this case.

31. Nesline is reported to have introduced Santo Trafficante to Borders in connection with an attempt to obtain a bribe in order to fix a case. The source of this information is Dredge, whose credibility is subject to dispute. Trafficante's death (M. Rogers, 2A at 242-43) and Nesline's incompetency make it impossible to now determine the nature and extent of their relationship and dealings with Borders.

32. The record does not reflect when Nesline first met Borders. The earliest evidence in the record of contact in 1981 is a message slip for Borders dated April 9, 1981 (Resp. Ex. 29A, 3B at 2421). There are regular indications in Borders's message slips thereafter (Resp. Exs. 29A-35A, 3B at 2421-2458). It seems clear that it was Nesline who introduced Dredge to Borders, although the date, place, and means of the first contact are subject to dispute. (Shull, 2B at 1821-22)

33. Sometime after Judge Hastings's trial and before Nesline became incompetent, he told two persons that he believed that Borders was pulling a scam on Judge Hastings and that the judge was innocent. (*Id.* 2B at 1822; Robinson, 2B at 1837) The available evidence indicates that Nesline's then and subsequent relationship with Borders was such that Nesline would have known in fact whether there was conspiracy or whether Borders was running a scam. (Shull, 2B at 1822-31)

F. William Dredge

34. William Dredge is a career criminal with a record dating back to 1943. (House Ex. 218, 3B at 1789-1834; Resp. Ex. 6, 3B at 2336-43) In 1981, he was an established fence and burglar whose home and business were in Miami. For some time prior to 1981, Dredge had engaged in a conspiracy to, and had in fact, purchased and sold substantial quantities of illegal drugs known as quaaludes. At the time he approached the authorities with information that gave rise to the investigation against Judge Hastings, Dredge was a defendant in a drug and racketeering case pending in federal court in Baltimore, Maryland. (House Exs.: 14, 3A at 199-210; 16, 3A at 211-24; Resp. Exs.: 5, 3B at 2332-35; 9, 3B at 2352-59; 14, 3B at 2381-88).

35. Dredge had met Nesline early in his career, but had not remained in contact with him. The reasons why Dredge approached Nesline in 1981 are unclear. (Dredge, 2A at 165; Shull, 2B at 1819-20; *id.* at 1831; Resp. Ex. 2, 3B at 2112).

36. Dredge had also served as a confidential informant for Jimmy Harmon, an agent of the Treasury Department's Bureau of Alcohol, Tobacco and Firearms. According to Agent Harmon, Dredge had wanted to keep his name out of a criminal case in Tennessee in the early 1970's, and Harmon had assisted him. Thereafter, Harmon maintained a relationship with Dredge. Harmon reported that, over the years, Dredge had supplied Harmon with reliable information on significant cases in which Dredge was not involved. (Harmon, 2B at 1853-81)

37. Dredge has given various accounts of his relationship with Borders and his role in the events that are the subject of this case. One account is reflected in the memoranda and telexes prepared by the FBI and a Justice Department attorney after he approached them in 1981. (Resp. Exs.: 9, 3B at 2352-59; 10, 3B at 2360-71; 11, 3B at 2372-76; 13, 3B at 2377-80; 15, 3P at 2389-91; 17, 3B at 2392-2400; 19, 3B at 2401-02) Another is reflected in the transcript of testimony he gave over a two-day period before an Investigating Committee of the Judicial Council of the Eleventh Circuit in 1985 (Resp. Exs: 2, 3, 3B at 1994-2172). At that time, Dredge maintained he had had extensive notes when he went to the FBI, but that he had destroyed them after he obtained a plea agreement in his drug case. (Resp. Ex. 2, 3B at 2098-99). He also insisted, in his 1985 testimony, that he had no recollection of the events that occurred other than that which he provided and that he had no recollection that could be refreshed by examining documents the Investigating Committee had gathered and that were

shown to him. (Resp. Exs. 2, 3, 3B at 1994-2148, 2149-2172). The third is reflected in the testimony and a deposition Dredge gave in this case (Dredge, 2A at 76-173; Resp. Ex. 4, 3B at 2173-2331). Dredge maintained before the Impeachment Trial Committee that, after fifteen to eighteen hours of preparation and document review with counsel for the House managers, his recollection had returned (Dredge, 2A at 107-08). The accounts Dredge has given of these three occasions is inconsistent and cannot be reconciled on material points.

38. Dredge did not know and had never spoken with Judge Hastings. According to Dredge, Borders may have pointed out the judge or introduced him at a hotel or Borders's office, but Dredge and the judge had never conversed. (Dredge, 2A at 117-118; Resp. Ex. 2, 3B at 2032, 2102-03)

II. A CHRONOLOGY OF FACTS AND EVENTS CLAIMED TO BE RELEVANT BY ONE OR BOTH PARTIES

A. Background Facts: 1979-1980

1. At the time of Judge Hastings's appointment, the United States District Court for the Southern District of Florida was, as it continues to be, among the busiest federal district courts in the nation (Hastings, 2B at 2272). Following his appointment, a number of pending cases were reassigned to Judge Hastings to assure a proper distribution of the court's case load. Among the cases so assigned was the case of *United States v. Romano*, No. 78-364-CR-ALH (S.D. Florida). (King, 2A at 1244-48; Hastings, 2B at 2217-18; *id.* 2272-74; House Exs.: 57, 3B at 2555-73; 58, 3B at 2574; Stip. No. 6, 2A at 26)

2. The defendants in the *Romano* case were Thomas and Frank Romano. The indictment alleged multiple violations of the Racketeer Influenced and Corrupt Organization Act ("RICO") and sought forfeiture of property alleged to be the products of their illegal activities. The government was represented throughout by James Deichert, a Justice Department attorney assigned to the Atlanta office of the regional Organized Crime Strike Force headquartered in Miami, Florida. The Romano brothers were represented through trial and for some time thereafter by Marshall Curran, a lawyer in Miami. (Deichert, 2A at 24-25; House Ex. 2, 3A at 3-16; Stip. No. 7, 2A at 26)

3. Notwithstanding the demands of his office, Judge Hastings continued to engage in a demanding schedule of extra-judicial tasks. He served as a member of the American Bar Association Standing Committee on Professional Practice and Discipline. He continued to participate in the activities of the National Bar Association and its Judicial Council. He served as a director or trustee of organizations such as Bethune-Cookson College. He spoke frequently to bar groups, community organizations, and other groups both within and without Florida. (Miller, 2A at 634-36; Hastings, 2B at 2223-25; Resp. Ex. 139, 3B at 2911-13)

4. Hemphill Pride entered prison to begin serving his sentence in March 1980. William Borders assumed office as President of the National Bar Association following the association's annual meeting in July 1980. The records necessary to evidence the contacts among Borders, Pride and Judge

Hastings were not sought prior to their destruction or at all. For that reason, there is no evidence to establish a basis for assessing whether patterns of contacts suggested by the partial records that are available for 1981 were in any way out of the ordinary. (H. Pride, 2A at 678; Resp. Ex. 74, 3B at 2585-86)

5. During his final year in law school, Jeffrey Miller had served as a legal intern in the chamber of the Honorable James C. Paine, one of Judge Hastings's colleagues on the federal bench in the Southern District of Florida. Following Mr. Miller's graduation, Judge Hastings hired him to serve as one of his law clerks for a one-year term beginning October 1, 1980. Mr. Miller was assigned responsibility for assisting the judge in cases having an even number. The *Romano* case was one of the cases Mr. Miller inherited. (Miller, 2A at 611, *id.* at 612, *id.* at 625; PT: Paine, 2B at 2099-2104)

6. The *Romano* case was not ready for trial until December 1980. The criminal charges were tried to a jury, and the Romanos were found guilty on all counts on December 23, 1980. During the course of the trial, the government alleged and proffered evidence suggesting that the Romanos, like many criminal defendants (King, 2A at 1248-1251), had access to significant amounts of cash and had previously used cash to improperly influence public officials -- specifically, building inspectors on projects they had constructed. The parties agreed that the forfeiture portion of the *Romano* case should be tried before Judge Hastings sitting without a jury. The

hearings on this part of the case were begun, but not completed, later that month. (Deichert, 2A at 26-28; House Ex. 2, 3A at 3-16; Stip. Nos. 8, 2A at 26; 11, 12, 14 *id.* at 28)

B. A Narrative Chronology of Events in 1981: A Partial Reconstruction

The House has marshalled evidence showing actual or possible telephone contacts and meetings between Judge Hastings and Borders. The evidence also shows some of the actual and possible telephone contacts and meetings between Judge Hastings and Pride, Borders and Pride, Borders and Nesline, Nesline and Dredge, and Dredge and Borders. Telephone and travel records and witnesses that would have been necessary to reconstruct a more complete account are no longer available. For example, the records for Borders's, Nesline's, and Pride's telephones in 1981 have been destroyed. The only telephone records for these three individuals that remain are message logs from Borders's office and the records for certain telephones to which Borders had access for the period May 7 through October 1981. Similarly, Joseph Nesline had become incompetent and the Romanos had died by the time of the hearings in this case. The account that follows should be studied with limitations such as these in mind.

7. The mid-year joint meeting of the NBA and its Judicial Council was scheduled to be and was held at the Carillon Beach Hotel in Miami Beach, Florida, from February 26 through March 1, 1981. Judge Hastings had agreed to and did deliver a keynote address, and Borders planned to and did attend as the President of the NBA. Only the records from Judge Hastings's

telephone are available for this period, and these reflect one call from Judge Hastings's home to Borders's home in the period preceding the meeting -- a call that lasted for three minutes or less on February 20. (Hastings, 2B at 2218-20; Resp. Exs. 74, 75, 3B at 2585-86, *id.* at 2587-96; Stip. No. 269, 2A at 507)

8. The docket in *United States v. Romano* reflects post-trial activity during January and February 1981 that is typical of the activity throughout the first half of 1981. The Romanos had filed a motion for a new trial or for judgment of acquittal in December 1980. In January, the government obtained an extension of time to respond. The government filed its opposition on February 6. The Romanos retained Neal Sonnett, a nationally prominent Miami lawyer, to represent them on appeal, and on February 17, he entered his appearance as additional counsel and filed a motion asking that the Romanos be permitted to travel outside the district so that they could explore opportunities in California. (House Ex. 2, 3A at 10; Resp. Ex. 7, 3B at 2344-2350; Stip. No. 13, 2A at 29)

9. Under the initial arrangement, Mr. Curran continued to represent the Romanos at the district court, and he appeared on February 20 when the trial of the forfeiture issue was resumed and concluded. At the close of those hearings, the judge entered an order to protect the property in which the government claimed an interest and directed the parties to submit proposed finding of fact and conclusions of law with

supporting memoranda. The government did not oppose the Romanos' request for permission to travel, and the judge entered an order so authorizing on February 26. (House Ex. 2, 3A at 10)

10. Pride was released from prison in March 1981 and reported that he was in regular telephone contact with Borders and Judge Hastings from that point onward. No records for telephones used by Pride in this period have ever been produced, and the available records do not reflect communications among Judge Hastings, Borders, or Pride during March. (H. Pride, 2A at 678; *id.* at 710)

11. The earliest indication of contact between Joseph Nesline and Borders shown by the available records are telephone messages recorded in the message logs at Borders's office. The first documented message was recorded on April 9, 1981. The message logs reflect regular contact thereafter. (Resp. Exs. 29A-35A, 3B at 2421-2458)

12. The message logs from Borders's office indicate that Pride called Borders twice on April 9, and there is also a message dated April 9, 1981 from Judge Hastings recorded in the message logs advising that the judge would be "at the office between 12 and 1". The judge's telephone records indicate that he made and charged to his home phone a long-distance telephone call at 12:15 p.m. that day from a pay phone outside his chambers to a pay phone at the United States courthouse in the District of Columbia on that date. That call lasted for one minute or less. Judge Hastings had no

specific recollection of these events, and there is no evidence to indicate whether Borders returned the call or whether there was any communication between them at this time. Although there was communication among the three in this period, there are no records to determine whether Borders called Pride or whether Pride or Borders called the judge on or shortly before April 9 (Hastings, 2B at 2220-2222; Resp. Exs. 27A, 28A, 29A, 3B at 2415-2424).

13. On April 21, 1981, Judge Hastings wrote a letter to the chairman of the NBA Judicial Council proposing that the NBA and its Judicial Council sponsor a black-tie dinner to honor former President Carter and/or former Attorney General Griffin Bell for their demonstrated commitment to appointing qualified minorities to the federal bench be held in conjunction with the annual meeting in Detroit in July. A significant purpose of the dinner was to raise funds for the work of the Judicial Council. Judge Hastings suggested that Borders should be able to persuade either former-President Carter or Judge Bell to attend given the role he had played in the campaigns and the administration. Judge Hastings sent a copy of this proposal to Borders and asked for his response on that and on "our report that is due soon." (Hastings 2B at 2222-24; Resp. Ex. 145, 3B at 2918-22)

14. The record reflects a cluster of calls from Judge Hastings to Borders during two weeks following the submission of that letter. He left messages at Borders's office on April 27 and 30 and on May 1 and 4, the last being marked "urgent."

(House Exs. 212, 213, 214, 3B at 1734, 35, 36; Stip. No. 79, 2A at 508) He tried to reach Borders at the house of a friend, Madeline Petty, shortly after midnight on May 6 and again left a message at Borders's office on May 7. (House Exs. 31h, 197, 3A at 282, 3B at 1718) The judge apparently tried to reach him again early on the morning of May 11. There was a call from the judge's house to Borders's house at 6:27 a.m. and another to Ms. Petty's at 6:28 a.m. Both lasted for one minute or less. (House Ex. 31h, 3A at 282) The available records do not indicate whether the messages were returned or whether the two talked during this period, although Judge Hastings does recall talking with Borders about this proposal. (Hastings, 2B at 2223) Again, the records are not available to determine whether or when Pride had telephone conversations with either man during this period, although it is probable that he did. (H. Pride, 2A at 678; *id.* at 710)

15. On April 29, 1981, a sealed eight-count indictment was filed in federal court in Baltimore which charged that William Dredge (and others) had conspired to distribute and had distributed drugs and had used facilities of interstate commerce in aid of racketeering activity (House Exs. 14, 16, 3A at 199-210, 211-224). Dredge was arrested at his home in Miami during the afternoon on Sunday, May 10, 1981. He remained incarcerated until he appeared before a magistrate the following morning when an appropriate bond and conditions for his release were established. (Dredge, 2A at 84-85)

16. Dredge has provided three conflicting accounts of his initial contact with Borders. When he first approached the government seeking a deal with the government, he claimed that he had known Borders for years. (Resp. Ex. 10, 3B at 2367) When confronted before a five-judge investigating committee in 1985, he placed the first meeting as having occurred at some time between the date the indictment was filed, April 29, 1981, and the date on which he was arrested, May 10, 1981. (Resp. Ex. 2, 3B at 2018-20) At the 1985 hearings, he claimed that he had little specific recollection and, when confronted with FBI memoranda recounting information he has allegedly supplied and other records, he claimed that he had no recollection that could be refreshed. (Resp. Exs. 2, 3, 3B at 1994-2148, 2149-2172 *passim*) Before the Impeachment Trial Committee, however, Dredge claimed that his 1989 recollections were detailed and specific. Having been prepared to testify and shown various documents over fifteen to eighteen hours, Dredge recalled the first meeting as having occurred at Joseph Nesline's apartment during the first week in March. (Dredge, 2A at 107-08)

17. Although the date on which Dredge first spoke with Borders and the dates of their subsequent meetings and telephone contacts is in dispute, the documentary record is not. There is no evidence of any contact between Borders and Dredge prior to May 5, 1981, in the long-distance records for Dredge's telephones or in the message logs for Borders's office. From May 5 through October, there is evidence of regu-

lar contact in these records. (House Exs. 10, 11, 3A at 163-84, 185-96; Resp. Exs. 33A, 34A, 35A, 3B at 2437-44, 2445-53, 2454-58) Before May 1981, Dredge flew from Miami to Baltimore-Washington Airport; there is no record of a flight to D.C. National Airport. (House Exs. 12, 13, 3A at 197, 198) From May through July, Dredge flew to Washington's National Airport; there is no record of a flight to Baltimore. (House Exs. 17 through 22, 3A at 225-230)

18. In any event, it is undisputed that Joseph Nesline introduced Dredge to Borders and that Borders aided Dredge in the initial phases of his drug case. Borders flew to Miami on May 5, giving Dredge's telephone number to the airlines as the number at which he could be reached while there. (PT: Boone, 2A at 474-75) This is the first documentary evidence of contact between the two men in the record. There was a further call from Borders's home to Dredge's on May 7. The next call came at 5:38 p.m. on May 10, after Dredge had been arrested. Borders called Dredge's house, and, shortly after this call, Borders called Jesse McCrary's house. The following morning Mr. McCrary appeared and represented Dredge at the bond hearings before a federal magistrate in Miami. These are the only communications or attempted communications between Dredge and Borders that are reflected in the record through May 18, 1981. (Dredge, 2A at 84-86; House Ex. 196b, 3B at 1713)

19. The docket reflected regular activity in the *Romano* case during March, April, and May. The necessary proposed orders and memoranda on the forfeiture issues were filed, the

last on April 8, 1981. At some point during this period, the Romanos asked Neal Sonnett to assume full responsibility for all aspects of the case, including post-trial motions in the district court. On April 28, the court sent notice advising the parties that the case had been set for sentencing on May 11. On May 4, Judge Hastings adopted in their entirety the proposed findings and conclusions submitted by the government and entered a judgment adjudicating an interest in the Sea Inn Motel valued at some $316,000 and profits realized by the Romanos from their activities in the amount of $846,000. (Sonnett, 2A at 217; House Ex. 2, 3A at 11-13)

20. On May 11, Judge Hastings was sitting in Ft. Lauderdale, Florida, away from his chambers and regular staff. Final arguments and sentencing in the *Romano* case were among the matters scheduled for that afternoon. At the outset of the hearing, Judge Hastings announced that he was prepared to hear arguments and proceed with sentencing and final disposition. Mr. Sonnett requested a continuance to permit additional briefing on points he did not think were adequately developed in the motion for new trial submitted by Mr. Curran. Mr. Deichert, the prosecutor, opposed the request. The judge granted additional time. Because of problems in Mr. Deichert's schedule, the court asked counsel for the parties to agree upon a date when all could appear for final hearing and sentencing. (House Ex. 4, 3A at 18-37; Stip. No. 19, 2A at 31)

21. Insofar as the evidence reflects, Mr. Sonnett had not given any notice of this request to the court prior to the commencement of the hearing. Mr. Sonnett had been unable to notify Mr. Deichert before his arrival at the courthouse and thought it probable that he had not advised the court in advance. Mr. Deichert testified that he did not see any indication that the judge was aware that such a request was coming. Jeffrey Miller, the judge's law clerk responsible for the *Romano* case, did not recall any such request. In any event, the judge testified that he had expected to proceed and did not know that a continuance would be requested. There is a speculative possibility that Mr. Sonnett may have called the judge's chambers before the hearing, but there is no evidence to support this speculation. (Deichert, 2A at 29-30, 55-56; Sonnett, 2A at 200-01, 201-02, 215-218; Miller, 2A at 613-15, 649-53; Hastings, 2B at 2276-78)

22. In May 1981, Joseph Nesline introduced William Dredge to Kenneth Robinson, a Washington, D.C., criminal defense lawyer. Nesline knew Robinson and, when Dredge began shopping for another lawyer to handle his drug case in Baltimore, Nesline apparently recommended Robinson. Dredge tried to get Robinson to "guarantee" the result, offering him $50,000 as a fee and an additional $50,000 to bribe officials, witnesses, jurors, or anyone else who could assure the result. Mr. Robinson declined, and Dredge left with Nesline. Mr. Robinson recalled these events with some clarity because he later received information suggesting that government agents

had been using Dredge as an undercover operative to set him up. Mr. Robinson testified that he was ultimately satisfied that this information was the product of extraordinary coincidence. (Robinson, 2B at 1834-45)

23. On May 16, 1981, then-President Reagan sought to remove Borders from office as a member of the District of Columbia Judicial Nominating Commission by appointing another lawyer to replace him. Borders filed suit against the President on June 8 seeking to have the President's attempt to remove him prior to the expiration of his term declared invalid and enjoined. (House Ex. 24, 3A at 241-50) Judge Hastings recalled that Borders had discussed the situation with him and others before and after filing suit. (Hastings, 2B at 2227)

24. On May 26, 1981, the South Carolina Supreme Court issued a 3-to-2 decision imposing indefinite suspension, rather than permanent disbarment, upon Hemphill Pride. (Resp. Ex. 110A, 3B at 2843-45) Judge Hastings and Mr. Pride recalled this as an event that generated considerable relief and as cause for discussion among Pride, Borders, and the judge. (Hastings, 2B at 2228-29) The available records reflect only two calls between May 11 and June 1, 1981, both on the morning of May 29 from Borders's residence to the judge's home and office, respectively. Each lasted one minute or less. (House Ex. 196b, 3B at 1713)

25. At the time of this decision, Pride faced substantial unpaid liabilities. He and his wife had separated. Shortly thereafter, Pride lost one of the two consulting po-

sitions he had obtained after his release from prison. By his own admission, Pride was in desperate financial straits throughout the period relevant to this case. (H. Pride, 2A at 707-08)

26. The nature of Judge Hastings's extra-judicial travel commitments is illustrated by his travel schedule for May and June. His schedule called for him to be in New Orleans on May 1st and again on the 5th and 6th; in Newark, New Jersey on May 7; in Lakeland, Florida, on May 9; in Cincinnati, Ohio, from June 3-6; in St. Petersburg, Florida, on June 20-21, and in Tampa, Florida, on June 24-28. (Resp. Ex. 139, 3B at 2911-13) Airline reservation records indicate that the judge's plans were frequently adjusted in late April and May. He appears to have adjusted his schedule so that he could fly directly from Miami to Newark on May 5. That flight was scheduled to depart from Miami International Airport at approximately the same time as Borders's return flight was scheduled to depart for D.C. The judge testified that he had not been aware that Borders was coming to Miami that day and that he did not see him. (Hastings, 2B at 2340-42) The records showing whether and which flight Borders actually took on that date are now missing. (PT: Boone, 2A at 473-76, 484-489)

27. Activity continued in the *Romano* case throughout June and July 1981. On June 1, Judge Hastings issued an order establishing the supplemental briefing schedule for post-trial matters in the *Romano* case and setting the case for final argument and sentencing on July 8, 1981. On June 5, Sonnett

filed the supplemental motion for new trial and a motion to reconsider the forfeiture judgment with supporting memoranda. (House Ex. 2, 3A at 14)

28. On June 19, 1981, the court of appeals for the circuit issued its opinion in *United States v. Martino*, (Resp. Ex. 36, 3B at 2459-85). *Martino* ruled that cash profits and proceeds of a racketeering enterprise were not subject to forfeiture under the RICO Act. By letter dated June 25, Mr. Deichert sent a copy of the *Martino* opinion to the court and to Mr. Sonnett. On June 29, the government filed oppositions to the Romanos' motion to reconsider the forfeiture, arguing that *Martino* was wrongly decided and was distinguishable in any event. On July 6, Mr. Sonnett filed a reply, arguing that *Martino* required the court to vacate the portion of the forfeiture judgment that had adjudicated forfeit the $846,000 in cash proceeds. (Deichert, 2I at 36-37, 47-49; Sonnett, 2A at 204-05; House Ex. 2, 3A at 10-12; Resp. Ex. 36, 3B at 2459-85; Stip. No. 21, 2A at 36)

29. Two other significant cases were assigned to Judge Hastings in June. On June 3, John Owens and Martha Rogers, Justice Department attorneys assigned to the Organized Crime Strike Force in Miami, filed a major indictment that named Anthony Accardo, Santo Trafficante, and fourteen other persons as defendants. The resulting case, *United States v. Accardo*, No. 81-230-CR-ALH, was routinely assigned to Judge Hastings. (House Ex. 216, 3B at 1768-86) On June 10, a major civil action was filed to protect the rights of recently arrived

Haitians who had been detained and threatened with summary return to Haiti. The suit named the Commissioner and other officials of the Immigration and Naturalization Service as respondents and sought emergency and permanent equitable relief to restrain these officials from implementing the administration's announced policies. The case, *Jean v. Meissner*, 81-1260-CIV-ALH, was also assigned to Judge Hastings. (Hastings, 2B at 2275; Resp. Ex. 162, 3B at 3179-87)

30. Other events occurred in this period that the House managers or respondent have alleged were relevant. The available records indicate that Dredge travelled to Washington on May 28 (House Ex. 109, 3A at 439) and that he called Borders twice, once on June 16 and once on June 18. (House Ex. 10F, 3A at 172) Borders filed suit against President Reagan in Washington on June 8, and the court conducted a status conference on June 10 and heard argument on June 18 in that case. (House Ex. 24, 3A at 241-50) Apart from an indication in airline reservation records that Judge Hastings had a reservation to fly to Washington on June 17 (House Ex. 97, 3A at 427), there is no evidence of any communications between Borders and the judge during June. The available records do not show whether the judge took this flight and there is no information concerning a return flight.[2] Although the testimony indicates that Pride was in regular telephone contact with Borders and

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[2] The House Managers did not examine the judge concerning this flight, and it is not reflected in the itineraries prepared by the judge's secretary. (Resp. Ex. 139, 3B at 2911-13) The airlines specialist was not examined concerning this record. (PT: Boone 2A at 427-503).

Hastings, there are no records from which the timing of these contacts can be determined. (H. Pride, 2A at 678; *id.* at 709-10)

31. The events scheduled for July indicated that there would likely be substantial communication between Judge Hastings and Borders. Borders planned to be in Miami on July 11, and he was to spend the afternoon visiting with Judge Hastings and Jesse McCrary. Judge Hastings was to be in Washington from July 17 to July 20 to attend a meeting of the ABA Standing Committee on Professional Practice and Discipline. Both men were scheduled to be at the NBA meeting in Detroit scheduled to run from July 27 to July 31. These events all occurred as planned. In addition, on July 7, the federal court in Washington ruled in Borders's favor in his suit against President Reagan, and by all accounts Borders was ecstatic. (McCrary, 2A at 1459-60; Hastings, 2B at 2230, 2233, 2234-35; House Exs. 24, 3A at 241-50; 110, 3A at 440; Resp. Exs. 79, 3B at 2597; 130, 3B at 2898; 147, 3B at 2933)

32. Telephone records show a call from Judge Hastings's home and his office to Borders's home and office on July 5 and 7 respectively. Each lasted for one minute or less. They show further calls on July 9 and 16. On July 9, the judge left a message advising Borders when the judge would return to Miami from a court sitting in Key West, Florida. The call on July 16 lasted one minute or less. (Stips. Nos. 284, 285, 286, 2A at 508; House Ex. 31F, 3A at 278)

33. Dredge was also in regular contact with Borders during July. Telephone records reflect a call from Borders's home to Dredge's home on the evening of July 5. Dredge flew to Washington on July 7 and remained there until July 9. According to Dredge, he was with Borders on July 7, the day that Borders learned he had won his suit against the President. Dredge also reported that he stayed at Joseph Nesline's apartment and observed Santo Trafficante there with Mr. Nesline. Dredge returned to Washington on July 16. At some point during these trips, Dredge retained Roger Spaeder and his firm, Zuckerman, Spaeder, Kolker & Evans, to represent him in his case in Baltimore. (Dredge, 2A at 87-92; House Exs. 111-118, 3A at 441-448)

34. All briefs and memoranda received in Judge Hastings's chambers were routinely routed directly to the law clerk responsible for the case in which they were filed. Pursuant to this practice, Mr. Deichert's letter advising the court of the *Martino* decision, the government's memorandum discussing that decision, and the memorandum filed on behalf of the Romanos on July 6 went directly to Mr. Miller, the clerk responsible for the case. (Hastings, 2B at 2278-79; Miller, 2A at 626-28)

35. Final argument and sentencing in the *Romano* case was one of five matters on Judge Hastings's calendar for the morning of July 8, 1981. Mr. Miller delivered handwritten memoranda concerning *Martino* and the other pending motions and discussed the issues with the judge only minutes before the

hearing began. Mr. Miller has consistently testified that Judge Hastings had not read or had the opportunity to read the *Martino* decision or review the motions and memoranda prior to the hearing. (Miller, 2A at 627-30, 641; Hastings, 2B at 2278-80; House Ex. 119, 3A at 449-60; Resp. Exs. 36, 38, 141A, 3B at 2459-85, 2486-94, 2915)

36. During the hearing, however, the judge advised the parties that he was familiar with the *Martino* decision. After hearing argument on the forfeiture issue, the judge announced that he was "prepared at this time to deny your motion, Mr. Sonnett [the motion to reconsider the forfeiture], and I will give a brief order with reference to this request. I will allow the forfeitures as previously set out by the Court to be maintained, and, as indicated, a brief order will be prepared that will recite the reasoning of the court at least insofar as the new matters that have arisen, more specifically the cases cited by the parties up to this time." (House Ex. 6, 3A at 105)

37. During the hearing, Judge Hastings also heard argument and denied the Romanos' motions for a new trial (House Ex. 6, 3A at 43-66). Judge Hastings also heard arguments on sentencing (House Ex. 6, 3A at 106-123). At the conclusion of the hearing, Judge Hastings entered judgments of conviction and sentenced each of the Romanos to three years in prison, with recommendations that they be confined in a minimum security facility and be considered for early parole and that arrangements be made to accommodate Thomas Romano's medical

problems (House Ex. 6, 3A at 123-135). The sentences imposed were consistent with the recommendations of the Probation Office and the arguments of counsel for the government. (House Ex. 7, 3A at 146-47; Resp. Exs. 118, 119, 3B at 2868-93, 2894-95) Without objection, the court continued their bond and the authorization for travel throughout the United States pending appeal. (House Ex. 6, 3A at 135-38)

38. Judge Hastings has consistently testified that, in fact, he Had not read the *Martino* decision before the hearing. (Hastings, 2B at 2279) Mr. Sonnett told his clients after the hearing that he did not think the judge had read *Martino* and that, when he had, he would reverse his position or be reversed on appeal. (Sonnett, 2A at 205) Mr. Miller has consistently testified that, when the judge instructed him to prepare an order concerning the forfeiture, he [Miller] understood that the judge wanted to stand by the original order, but only if that could be done consistently with the law of the circuit. (Miller, 2A at 630-31) Mr. Deichert has since acknowledged that the judge was required to vacate to cash proceeds portion of the original order if he followed *Martino*. (Deichert, 2A at 36, *id.* at 50) Mr. Miller has also consistently testified that he was unable to distinguish *Martino* satisfactorily. By the end of July, he had prepared a draft order (House Ex. 120, 3A at 461) that would have called for additional briefs on the issue. (*Id.* at 472) He did not submit this draft to the judge, and he had to set the Romano file

aside in August to work on more pressing matters. (Miller, 2A at 619-20)

39. Borders did travel to Miami on July 11, 1981. The judge picked him up, and they went to Jesse McCrary's home, where they spent the afternoon. The judge then drove Borders to a taxi stand where he left him. According to Mr. McCrary and Judge Hastings, the discussions were general and did not address any subject that has been identified as relevant to these proceedings. (Hastings, 2B at 2231; McCrary, 2A at 1459-60)

40. Judge Hastings was in Washington for the ABA standing committee meeting from July 17 to 20. During this period, he and Borders had luncheon with a lawyer from Columbia, South Carolina, who was acquainted with Hemphill Pride and his problems. Borders also agreed to meet the judge, Noel Smith, and Brenda and Danny Russell at the Lion D'or for dinner on one of the evenings during this visit. The judge and the others assembled as agreed. Borders did not show up. (Hastings, 2B at 2231-32, 2232-33)

41. On July 20, 1981, Dredge went to the office of the United States Attorney in Miami to try to make a deal in his drug case. Over the next few days, he told attorneys for the Strike Force responsible for the *Accardo* case and agents of the FBI that Borders was soliciting a bribe from Santo Trafficante to fix the case before Judge Hastings. He also told them that Borders was also seeking $150,000 bribe from the Ro-

mano brothers to assure that their jail sentence would be eliminated. (Resp. Ex. 11, 3B at 2375)

42. In these initial interviews, Dredge also reported that Borders was engaged in a similar scheme involving a federal judge in Louisiana. (Resp. Ex. 13, 3B at 2378) Dredge reportedly claimed that he had known Borders for years (Resp. Ex. 10, 3B at 2367) and implied that he had heard Borders and Hastings discussing a bribe scheme. (Resp. Ex. 11, 3B at 2375) Dredge subsequently confirmed that he had never heard any conversation between Borders and the judge. (Dredge, 2A at 117-18; Resp. Ex. 2, 3B at 2032, *id.* at 2102-03)

43. The FBI had information from the outset indicating that Borders had made unfounded claims with respect to other judges. (Resp. Ex. 13, 3B at 2378) Moreover, Dredge's report, as it related to Borders was corroborated. As Dredge predicted, Borders made a trip to Miami and was observed talking with Trafficante on July 21. (Murphy, 2A at 246-47) The FBI, however, had no evidence, other than Dredge's claims, to indicate that Judge Hastings was, or was a likely candidate to be, involved in such a corrupt scheme. (Amoroso, 2A at 1361)

44. Judge Hastings, Borders, and other black judges and lawyers assembled in Detroit for the NBA meeting from July 27 to 31. Hemphill Pride was expected but did not come. Borders called Pride from the hotel and several of those present, including Judge Hastings, spoke with him and urged him to come to Detroit. After that call Borders "passed the hat" and collected some $750 to assist Pride. (H. Pride, 24 at 709; Hast-

ings, 2B at 2235) According to Judge Hastings, Borders pressed the judge to prepare letters soliciting funds and character references to aid Pride in his efforts to gain readmission to the Bar. The judge has consistently testified that Borders thereafter persisted in this request, notwithstanding the judge's repeated statements that he thought such an effort would conflict with his ethical responsibilities as a judge. (Hastings, 2B at 2235, 2249-50)

45. During August, Dredge remained in contact with Borders. The available records reflect three telephone calls -- two from Borders to Dredge, one on August 18 and one on August 23, and one from Dredge to Borders on August 31. (House Exs. 27a, 3A at 255-57; 196D, 3B at 1712; 11D, 3A at 190) Dredge reported to the FBI that Borders was coming to Miami to meet with Trafficante again. Borders's visit occurred on August 21, and the FBI again observed him talking with Trafficante. (Murphy, 2A at 247-48) Although not reflected in the available records, Dredge reportedly said that he was in Washington at Borders's office on August 29 and 30. (Resp. Exs. 10, 3B at 2360-71; 13, 3B at 2377-80; 14, 3B at 2381-88) By his own admission, Dredge was maintaining contact with Borders during this period in order to keep his interest in the Romano deal alive while Dredge attempted to negotiate a favorable deal in his drug case. (Dredge, 2A at 93-94; *id.* at 124-25)

46. At the outset, the FBI's Miami office assigned Special Agent Anthony Amoroso to serve as the supervising agent and Special Agent William Murphy to serve as case agent in the

investigation initiated by Dredge's report, an investigation assigned the code name "Operation Apple Eye." In accordance with Justice Department policy, the legal aspects were transferred from the United States Attorney's office in Miami to the Public Integrity Section of the Justice Department's Criminal Division in Washington. The Public Integrity Section assigned the case to Reid Weingarten, one of the trial attorneys in the section. (After the undercover operation and Borders's arrest, Robert Richter, a deputy chief in the section, was assigned to assist in the prosecution.) (Murphy, 2A at 243-44; Richter, 2A at 891; Amoroso, 2A at 1355, *id.* at 1358)

47. Negotiations between Dredge and the FBI and the FBI and the Justice Department continued throughout August. Dredge eventually proposed the undercover scenario that was adopted. Dredge would introduce an undercover agent posing as one of the Romano brothers. The undercover agent would agree with Borders on the price, motions to be filed, and time and would insist upon a show of proof such as the restaurant scenario that Dredge had reported that Borders had suggested. The undercover agent would also agree to an exchange of front money (Resp. Ex. 10, 3B at 2364). The Miami office reported that the United States Attorney in Baltimore was balking at the proposal in view of the limited cooperation Dredge was offering and requested that headquarters officials intervene with appropriate Justice Department officials to assure the deal was accepted. (Resp. Ex. 9, 3B at 2359)

48. At some time early in the investigation, Agent Murphy or Reid Weingarten contacted James Deichert, the prosecutor in the case, to apprise him of the investigation and to ask him about the case. As a result of these conversations, Mr. Deichert was asked to inform Agent Murphy about any telephone conversations he had with Mr. Miller about the status of the *Romano* order. Mr. Deichert did call in August and learned that Mr. Miller was preparing an order. (Deichert, 2A at 52-53; Miller, 2A at 633-34)

49. Borders's term as president of the National Bar Association had concluded at the annual meeting in Detroit. On August 24, 1981, Barbara Whiting, a NBA official, sent a letter to Judge Hastings inviting him to become a sponsor of a dinner-cruise honoring Borders for his service as president of the NBA. The event was initially scheduled to be held on October 16, 1987. (Resp. Ex. 156, 3B at 2943) Judge Hastings promptly agreed and sent a check to Ms. Whiting. (Hastings, 2B at 2236-37; Resp. Ex. 131, 3B at 2900)

50. Jeffrey Miller had set the draft *Romano* order aside in late July to work on other more pressing matters that had arisen in August. On August 27, the court of appeals issued a decision in *United States v. Peacock*, 654 F.2d 339 (5th Cir. 1981). *Peacock* reversed a district judge who had entered a RICO forfeiture order that conflicted with *Martino* and had reiterated that *Martino* remained binding upon all district courts in the circuit. Mr. Miller promptly brought the *Peacock* decision to the judge's attention and told him that the

court of appeals was following *Martino* and, for that reason, that he should give the Romanos back the money he had included in his original forfeiture judgment. According to Mr. Miller, the judge promptly instructed him to do so and to prepare an order that conformed to the law of the circuit but that also expressed the judge's disagreement with *Martino* and *Peacock*. The undisputed evidence indicates that this conversation occurred in early September and in any event before September 10, 1981. (Miller, 2A at 631-33)

51. During his final year in law school, Mr. Miller had interned in the chambers of Judge James C. Paine and had impressed Judge Paine with his work. In the spring of 1981, Judge Paine had received authorization to hire a third law clerk to assist him in meeting the demands of his caseload. The authorization became effective September 1, 1981. Judge Paine invited Mr. Miller to take this position as soon as his clerkship with Judge Hastings ended, and Miller agreed. At some point thereafter, it became clear that Mr. Miller would probably not be able to complete his work on pending matters assigned to him by the end of September. Judge Hastings and Judge Paine discussed the matter, and Judge Paine agreed that Mr. Miller could stay to complete his work with Judge Hastings. Their agreement was that Mr. Miller would start with Judge Paine as soon as he finished his work with Judge Hastings and not later than November 1. (Hastings, 2B at 2283; Pt: Paine, 2B at 2101-2104)

52. Pride continued to communicate with Borders and Judge Hastings over the summer and to seek their advice on matters that might affect his chances for readmission to the Bar. Both Pride and Judge Hastings recalled that Pride had been concerned about the affect that a speech he had given might have. Pride had criticized the South Carolina Supreme Court for its employment practices. Borders and Judge Hastings advised him to seek an appointment with the Chief Justice and apologize. Pride did finally meet with the Chief Justice in early September. Pride recalled that he had discussed this meeting with Judge Hastings both before and after it occurred. The absence of records makes it impossible to fix the dates of these communications. Pride also visited Borders in Washington in September. (H. Pride, 2A at 679-82, id. 708-11; Hastings, 2B at 2236)

53. Earlier in the year, Judge Hastings had agreed to speak in Harrisburg on Monday, September 14, 1981. (Resp. Ex. 94, 3B at 2656) Jesse McCrary had agreed to speak in Norfolk, Virginia the preceding week and had planned to spend the weekend in Washington to visit with his daughter and other friends. When Judge Hastings learned of Mr. McCrary's plans, he agreed to come to Washington for the weekend and stay at the Sheraton Hotel with McCrary. The judge discussed his plans with Borders. (McCrary, 2A at 1452-53; Hastings, 2B at 2237-39)

54. Borders's family had scheduled a family reunion to be held in Ft. Pierce, Florida, on the weekend of September

12-13, and Borders had planned to attend. Judge Hastings testified he was aware of Borders's plans and that Borders was aware of McCrary and his plans. (Hastings, 2B at 2238-39, *id.* at 2239-40) On August 28, the judge had made reservations to fly to Washington on September 10. (PT-Boone, 2A at 490; House Ex. 70, 3A at 397). According to the judge, Borders had agreed he would pick him up at the airport on that date. (Hastings, 2B at 2239)

55. The government finally gave Dredge a deal that was acceptable on September 10, 1981. (House Ex. 23, 3A at 231-40) Under that deal, Dredge agreed to plead guilty to a single count of the indictment and to introduce Borders to an undercover agent posing as one of the Romanos. (*Id.* at 231, *id.* at 240) The government agreed that Dredge would not be called as a witness and would not be wired or recorded in any of his activities in cooperating under the agreement. (*Id.* at 231-32) Although the government agreed not to impose any further obligations upon Dredge, it also agreed that Agent Murphy would appear and report to the sentencing judge, *in camera*, the full nature and extent of the cooperation Dredge provided. (*Id. at* 232) The agreement was formally issued on September 11 and signed by Dredge and his attorney on September 12. (Murphy, 2A at 245; House Ex. 23, 3A at 234).

56. During the week of September 6, 1981, Judge Hastings presided over a jury trial in a criminal case, *United States v. Vicknair*. As the trial progressed, it became clear that it would not be over by September 10. That morning the judge

changed his flight reservations for September 10 to a flight on September 11, 1981. The records reflect that Borders called Judge Hastings's chambers on the evening of September 10, 1981. The trial in fact ended earlier than expected on September 11, and the judge tried to catch a plane departing from Miami at 3:48 p.m. That flight was delayed, and the judge left messages at Borders's office and called Shirley Ross, a woman whom he was to take to dinner, to inform them of the delays. The judge's flight eventually left Miami at 5:50 p.m., and arrived in Washington shortly after 8:00 p.m. on September 11. The judge reported that his luggage was delayed. The judge took a taxi to Shirley Ross's apartment to pick her up for dinner. According to the judge, the driver got lost. The judge and Ms. Ross went by taxi to the Sheraton. The hotel's records indicate the judge checked in at 10:14 p.m. (Hastings, 2B at 2238-2242, 2367; House Exs. 28, 3A at 266; 29, *id.* at 269; 30, *id.* at 270; 31d, *id.* at 276; 32, *id.* at 289; Resp. Ex. 88, 3B at 2650; Stips. Nos. 37-38, 2A at 254; Pt: Ross, 2B at 2119-2123)

57. Dredge called Borders in Agent Murphy's presence at 1:30 p.m. on September 10 and told Borders that the Romanos were ready to deal. Borders agreed to meet with Dredge and one of the Romanos at Miami International Airport the following Saturday morning, on September 12. Borders had initially been scheduled to fly to Miami for his reunion weekend on a flight that left at 7:30 p.m. He changed his reservation and in fact departed on a flight that left at 9:30 p.m. (Dredge,

2A at 94-95; Murphy 2A at 252-54; House Exs. 33, 34, 35, 3A at 303-305; Stips. Nos. 43-44, 2A at 257)

58. The FBI observed Borders's departure from Washington National Airport on September 11. The overlap between the judge's arrival at 8:00 and Borders's departure at 9:30 p.m. establishes a time when the two men could have met. Judge Hastings has consistently denied that such a meeting took place and has testified that delays in receiving his luggage and the fact that the cab driver had difficulty finding Ms. Ross's apartment were responsible for the time it took him to get to the Sheraton. The FBI did not observe any meetings between Borders and the judge, and there is no evidence that such a meeting occurred. (Hastings, 2B at 2241-42; Pt: Ross, 2B at 2119-2123)

59. Through Special Agent Amoroso, the FBI contracted with a retired FBI agent, H. Paul Rico, to serve as an undercover agent posing as Frank Romano. On September 12, Dredge introduced Rico to Borders as Frank Romano. Borders asked Dredge to wait until after Borders and Rico/Romano had conducted their business so that Borders could talk with him. Dredge agreed. (Dredge, 2A at 95; Murphy, 2A at 252; Rico, 2A at 409-10, House Exs. 38A, 38B, 3A at 307-318)

60. The meeting between Rico/Romano and Borders was recorded. Borders confirmed that the price would be $150,000. Borders agreed that, in order to demonstrate the judge's involvement, the judge would appear for dinner at the Fontainebleau Hotel on the following Wednesday, September 16,

and would, within 10 days, issue an order returning a substantial amount of the property that he had adjudicated forfeit. Rico/Romano agreed to meet with Borders at the airport the following Saturday, September 19, to put an unspecified amount of money "up front". The two agreed that after the order had been issued, the Romanos would dismiss their appeals from the convictions and file motions asking the judge to mitigate their sentences. (House Exs. 38A, 38B, 3A at 307-318)

61. Borders went from that meeting to his family reunion in Ft. Pierce, Florida. He cut short his attendance and made arrangements to fly from Orlando, Florida, to Baltimore-Washington Airport that evening. His plane arrived in Baltimore at 9:00 p.m. (Thomas, 2A at 427-29; House Exs. 72-74, 3A at 399-401)

62. Judge Hastings and Jesse McCrary had a suite with adjoining rooms at the Sheraton. They spent the afternoon calling friends and visiting while they watched television and had drinks. Mr. McCrary's daughter, Bonnie McCrary, came for a visit, but did not remain because she had other plans for the evening. Donna Myrill, a former secretary whom Mr. McCrary had encouraged to go to law school, joined the party for the evening. Judge Hastings had invited Pearl Dabreau, a woman from Trinidad he had met earlier that year, to visit. Ms. Dabreau agreed to return for drinks and dinner and asked if she could bring her sister, Margaret. The judge agreed. (Mendez-Myrill, 2A at 510-11; M. Dabreau-Owens, 2A at 1399-

1400; McCrary, 2A at 1452-55; P. Dabreau Mapp, 2B at 1722-24; Hastings, 2B at 2242-44; Dep. M. Dabreau-Owens, 2A at 1401-04)

63. The five-person party assembled about 8:00 or shortly thereafter that evening in the hotel rooms for drinks and snacks, the last arriving around 8:00 as near as anyone can recall. They were still socializing at about 10:00 p.m., when Borders appeared at the door. Judge Hastings has consistently testified that he did not expect Borders and was surprised when he showed up. His testimony was corroborated by Mr. McCrary who also testified at the 1983 trial. Both the Dabreau sisters testified that they did not recall that the group was waiting for anyone else to arrive. Only Donna Myrill testified that the group was waiting for Borders, although she did not specify when or from whom she received the information. The FBI had interviewed the Dabreau sisters, at least, before the 1983 trial. The government did not call any of the three to testify at the 1983 trial. (Mendez-Myrill, 2A at 511-12; M. Dabreau-Owens, 2A at 1399-1400; McCrary, 2A at 1455-57; P. Dabreau Mapp, 1724-26; Hastings, 2B at 2244-2246; Dep. M. Dabreau-Owens, 2A at 1404-14 and Dep. Ex[illegible]., B, 2A at 1419-27, 1428-29)

64. Borders joined the group for dinner and drove the judge and Mr. McCrary to the airport the following morning. According to Judge Hastings, it was during this period that Borders told him that he would be in Miami on Wednesday, September 16, and asked Judge Hastings to meet him in the main dining room of the Fontainebleau at 8:00 p.m. The judge re-

ported that he agreed. (McCrary, 2A at 1456; Hastings, 2B at 2245-47)

65. Judge Hastings invited Essie Thompson to have dinner with him at the Fontainebleau on Wednesday, September 16, and made reservations for two. They arrived at 7:45 p.m. They went to the main dining room where Judge Hastings spoke with the maitre d' and the hostess. They were seated at a table for four, but two place settings were removed. After they had ordered, Judge Hastings excused himself, left the dining room, and went to the Poodle Lounge and Steak House, another facility in the hotel. Upon his return, he told Ms. Thompson he had been looking for friends from D.C. According to the judge, he had been looking for Borders and had made inquiries with the maitre d' and hostess and in the Poodle Lounge. The judge had not previously told Ms. Thompson whether he expected to meet anyone at the Fontainebleau. (Thompson, 2A at 518-22; Hastings, 2B at 2246-48)

66. Borders had in fact made arrangements to take a friend, Madeline Petty, to Las Vegas to see the Leonard-Hearns fight at Caesar's Palace. There is no evidence that the judge was aware of this arrangement. They flew to Las Vegas on September 15. The available records indicate that Dredge placed a call to Caesar's Palace on the evening of September 16. There is no evidence concerning the purpose of this call or further communications that may have occurred on that evening. Borders and Ms. Petty returned to Washington on the evening of September 18. Borders remained at the airport to

catch a flight to Miami for his meeting with Rico/Romano on September 19. (House Ex. 10c, 3A at 166; Stips. Nos. 77-79, 90-91, 1 at 928-29)

67. Borders met with Rico/Romano on September 19, and again the conversation was recorded. Rico/Romano gave Borders $25,000 cash as a down payment. Borders advised Rico/Romano that the order returning the property would be issued within 10 days of that date, -- *i.e.* by September 29. Borders insisted that the balance be paid after the order was issued, rather than after the sentences had been reduced, on the ground that "the others guys gotta be having twenty." Rico/Romano responded, "Yea, right." They agreed that they would meet again at Miami International Airport on Saturday, October 3, for the final payoff, and Borders confirmed that the order would be done by then. (House Exs. 43A, B, 3A at 323, 324-31)

68. On September 21, 1981, Barbara Whiting sent another letter to Judge Hastings with the formal invitation for the dinner-cruise honoring Borders. The date of the event had been changed to Friday, October 9, to avoid conflict with a local judicial conference meeting scheduled to occur in Washington on October 16. (Hastings, 2B at 2250-51; Resp. Ex. 85, 3B at 2646)

69. The FBI planned the remaining steps in the covert phase of Operation Apple Eye on the premise that Judge Hastings would issue the order on or before September 29 (Resp. Ex. 23, 3B at 2409-12). Justice Department attorney Reid

Weingarten advised that even these two shows of proof, the dinner at the Fontainebleau and the timing of the order, could be explained as coincidental and agreed that electronic surveillance should be initiated to seek direct evidence of the judge's involvement. After the order was issued and the wiretaps in place, the undercover agent was to call Borders to attempt to provoke conversations about the *Romano* case between Borders and Hastings that could be recorded. The final payment of $125,000 would then be made on October 3; Borders would be arrested immediately; and an attempt would be made to gain his cooperation. (Resp. Exs. 22-23, 3B at 2403-2412)

70. There is no record of any telephone contacts between Judge Hastings and Borders between September 10 and October 5. Judge Hastings testified, however, that he recalled speaking with Borders by telephone on September 20 or 21. According to the judge, Borders did not respond when the judge asked him about his failure to appear at the Fontainebleau. Judge Hastings has never claimed that he could recall the particular topics discussed in specific telephone calls indicated by the records. He has consistently testified that he and Borders regularly discussed Pride's problems and that Borders persisted in urging the judge to prepare letters seeking support for Pride, notwithstanding any ethical reservations he may have had, throughout this period. (Hastings, 2B at 2248-50)

71. At no time between September 10 and October 5 did Judge Hastings instruct or pressure Mr. Miller to complete the *Romano* order. Mr. Deichert again called Mr. Miller about the

case on September 22, 1981. (Deichert, 2A at 52-53; Miller, 2A at 632-34)

72. The forfeiture order was not issued on September 29. The Justice Department sought and obtained court authorization to intercept and record telephone calls to and from telephones at Borders's home and office. On October 2, Rico/Romano called Borders to ask what had happened. Borders said he did not know. Rico/Romano called on October 4 and again asked; Borders said he had not been able to find out. On Monday, October 5, at 4:22 p.m., Rico/Romano called again. This time Borders reported the matter "had been taken care of" and the order would go out "probably today or first thing in the morning." Borders also told Rico/Romano: "Your friend should tell you something. Where you say you went before." (House Exs. 50A, 50B, 3A at 349-53; 52A, 52B, 3A at 356-57; 53A, 53B, 358-362)

73. There is no evidence that Borders talked with Judge Hastings at any time after September 21 and prior to the call at 4:22 p.m. on October 5 in which Borders assured Rico/Romano the matter had been taken care of. There was a call made by Cynthia Rogers, a receptionist, not Borders, from Borders's offices to Judge Hastings's chambers at 4:50 p.m. on October 2. (House Exs. 51A, 51B, 3A at 354-55) No message was left. There were two other lawyers who worked in the same offices as Borders -- James Cobb and Dudley Williams -- who were also friends of Judge Hastings. Although it was not intercepted and there is no record of it, Judge Hastings testified that

Borders had called his home on Sunday, October 4, and had left a message with the judge's mother asking the judge to call him about Pride. At the time, the judge was at the Sonesta Beach Hotel on Key Biscayne, Florida, attending a meeting of the Florida Chapter of the NBA. (Hastings, 2B at 2252-53; Resp. Ex. 128, 3B at 2896-97)

74. Judge Hastings reported that he did become concerned when he had not received an order on the *Romano* forfeiture from Mr. Miller by early October. The judge was scheduled to leave Miami on October 7 and to be out of Miami for most of the remainder of the month. Mr. Miller had already extended his term and was scheduled to begin working for Judge Paine as soon as he completed work on matters that had been assigned to him. Judge Hastings had previously had difficulties when a clerk had left before completing a significant assignment. The judge reported, and Miller confirmed, that on the morning of Monday, October 5, Judge Hastings inquired about the Romano order and, when Miller said it was incomplete, that the judge told him to do it that day. Mr. Miller reported that it was unusual, but not unprecedented, for the judge to issue such a pre-emptory instruction. According to the judge, it was his travel schedule and concern over Mr. Miller's impending departure that caused him to give this instruction. (Miller, 2A at 621-23, 633; Hastings, 2B at 2281-82)

75. On October 5, Judge Hastings was presiding over a jury trial in a criminal case, *United States v. Santarelli*. The judge testified that during the course of the day he pre-

pared three hand-written draft letters. One was a draft of a letter to solicit funds for Hemphill Pride. Another was a draft of a letter to solicit character references for Pride. The third was a draft of a letter to Pride seeking his comments and views on the other two proposed letters. The judge testified he wrote these letters as a result of Borders's persistent requests and because that was what he assumed Borders had intended to discuss when he had called the judge's house and left the message with the judge's mother the preceding day. (Hastings, 2B at 2254-57; House Ex. 154, 3A at 735-740; Resp. Ex. 106, 3B at 2829-38)

76. At 5:12 p.m. on October 5, after the trial had been recessed, the judge called Borders. That call was intercepted and recorded and has since been subjected to intense analysis and conflicting views as to its significance and meaning. The transcript of this conversation that was admitted in evidence was prepared by a professional linguist and includes pause fillers and repetitions that are ordinarily omitted in transcripts and that are not noticeable in ordinary conversation. (Shuy, 2A at 535; *id.* at 558, 561-62; House Ex. 53A, B, 3A at 358, 359)

77. In that conversation, the judge told Borders, "I've drafted all those, ah, ah, letters, ah, for Hemp, and everything's okay. The only thing I was concerned with is did you hear if, ah, you hear from from him after we talked. Borders responded that he had: ". . . I talked to him and he, he wrote some things down for me." The judge responded, "I under-

stand." Borders continued, "And then I was supposed to go back and get some more things." The judge responded: "Alright, I understand. Well then, there's no great big problem at all. I'll, I'll see to it that, ah, I communicate with him. I'll send the stuff off to Columbia in the morning." (House Ex. 53A, B, 3A at 358, 359)

78. The judge has consistently testified that the conversation concerned letters for Hemp and had no other meaning. According to the judge, he called Borders to report that he had drafted the letters for Hemp, as Borders had persistently requested, and to inquire whether Borders had talked with Pride to confirm his needs. The judge reported that he understood Borders's response as confirmation that Pride, during his prior conversations and visit to Washington, had supplied Borders with information and that Borders was supposed to contact him for more. The judge said that he saw no problem because he intended to transmit the two drafts to Pride for his approval in any event. For that reason, the judge told Borders that he would send the drafts to Pride in Columbia, South Carolina, on the following day. (Hastings, 2B at 2257-58)

79. Notwithstanding that conversation, the judge has consistently testified that he reflected upon the matter that night and again concluded that his position as a judge would make it improper for him to solicit funds. He decided that he would inform Borders and Pride when they met at the dinner-cruise on the following Friday. He did not have the drafts typed. (Hastings, 2B at 2258)

80. The trial in *United States v. Santarelli* continued on Wednesday, October 6. During the course of the day, Judge Hastings issued an extensive preliminary injunction in *Jean v. Meissner*. (Resp. Ex. 162, 3B at 3179-87) Toward the end of the day, Mr. Miller submitted the completed *Romano* order. The judge signed it and asked that it go out that day. Marilyn Carter, the deputy clerk assigned to Judge Hastings's chambers, processed the orders and prepared copies for mailing to counsel. She marked the envelope for the prosecutor's copy "special delivery." She said she did this without instruction from the judge because she thought the order was important. She gave the envelope to Jeffrey Miller to deposit in the mail as he left for the day. (Miller, 2A at 623; M. Carter, 2B at 1767-68)

81. On October 7, Rico/Romano called Borders at 12:19 p.m. to inquire about the order. Borders told him it had gone out the previous morning. At 7:39 p.m., Borders called Rico/Romano. Rico/Romano confirmed receipt of the order and agreed to try to come to Washington to pay Borders on Thursday or Friday. (House Ex. 60A, B, 3A at 372, 373-75)

82. Judge Hastings embarked on his planned itinerary on October 7. He spoke at Albany State Teachers College in Albany, Georgia, on October 8. The judge called Borders to inform him of the flight he would be taking to Washington the following day. In that conversation, he reported that he had been unable to get a room at the L'Enfant Plaza and had booked a room at the Washington Hilton. Borders indicated that he

would pick the judge up at the airport and would arrange to get him in at the L'Enfant Plaza. (House Ex. 61A, 61B, 3A at 376, 377-79)

83. The FBI confirmed their arrangements for the payoff and arrest on October 8. Surveillance teams were assigned to watch Borders and Judge Hastings on October 9. Room 103 at the Twin Bridges Marriott in Arlington, Virginia, was equipped with audio and video equipment so the payoff and arrest could be recorded. Agents Amoroso and Murphy flew to Washington with Rico/Romano and the $125,000 in cash. (Resp. Ex. 22, 3B at 2403-08)

84. That evening, Gerald McDowell, chief of the Public Integrity Section, called Atlee Wampler, the United States Attorney for the Southern District of Florida, to advise him of the status of the investigation and of the plans for the payoff and arrest on the following day. Martin R. Raskin, the Assistant United States Attorney in charge of the criminal division in Miami, was present during this call and participated in the discussion. He reported that both he and Mr. Wampler vigorously opposed the decision to arrest Borders at the scene of the payoff and argued strongly that Borders should be permitted to take the money so that Judge Hastings's guilt or innocence might be conclusively established. Mr. McDowell informed them that the decision to make the arrest and seek Borders's cooperation had been made and was final. Based upon their experience as prosecutors, Mr. Raskin testified that both he and [Mr. Wampler] believed that this decision did not

satisfy proper prosecutorial or investigative standards. (Raskin, 2B at 1893-95; *id.* at 1896-97, *id.* at 1897-98)

85. Judge Hastings arrived at Washington National Airport at 10:40 a.m. Borders met him and they drove to the L'Enfant Plaza. They arrived at 10:50 a.m. They checked in at 11:00 a.m., and the judge sent a suit to be pressed. He and Borders stopped at Hemphill Pride's room. Pride was there with his wife, Shirley, and their son, Elliot. Pride was changing clothes and invited the judge to accompany the Prides on a shopping trip. The judge declined. The judge indicated he needed to have a bag repaired, and Borders offered to take him to a luggage store. (Hastings, 2B at 2260-63)

86. Judge Hastings left the hotel with Borders. Borders made two stops and then drove to his office. After returning some telephone calls, Borders told the judge that he had to go out on business. The judge asked Borders to direct him to a shopping area where he might find a luggage store. Borders did, and the judge left Borders's office and walked to Nikki Youngs, a dress shop owned by Brenda Russell, a friend. The judge stopped at a luggage shop, purchased a bag and returned to the hotel. He ordered lunch from his room at 1:00 p.m. (Hastings, 2B at 2263-65; House Ex. 130, 3A at 538)

87. The judge has consistently testified that, upon his return to his room, he made two local calls and a long-distance call to his chambers from his room at the L'Enfant Plaza, in which he learned that Barbara Whiting had called. Barbara Katzen confirmed that he had called his chambers from

the hotel. Barbara Whiting remembered she had called the judge's chambers and remembered receiving a call from him to confirm he had received the message. Carolyn Lewis, another organizer of the dinner-cruise, confirmed that she had received a call from the judge while he was at the hotel. In the ordinary course of the L'Enfant Plaza Hotel's business, all of these calls should have been reflected on the judge's bill and the long-distance call should have been reflected in other records. The hotel records did not reflect these calls. (Hastings, 2B at 2267-68; PT: Lewis, 2B at 2156-58; PT: Whiting, 2B at 2152; PT: Katzen, 2B at 2166)

88. Rico/Romano called Borders's office at 11:08 a.m. on October 9 from the Twin Bridges Marriott and left the number at which Borders could reach him. Borders returned the call from his office at 11:46 a.m. Rico/Romano told Borders where he was, and Borders said he would be there in an hour. (House Exs. 62A, B, 3A at 380, 381; 64A, B, 3A at 383, 384-85)

89. According to the FBI arrest log, Borders arrived at the Twin Bridges Marriott at 12:37 p.m. He asked Rico/Romano to get the money and accompany him for a ride. Borders was arrested as he pulled out of the parking lot and taken back to Room 103. Borders remained in Room 103 from 12:55 p.m. until 1:56 p.m. At 1:07 p.m. Borders signed a waiver of rights form. At 1:18 p.m. Borders called his attorney, John Shorter. Shorter arrived at the hotel at 1:31 p.m. Over the next 25 minutes, Borders and Shorter had three private conversations

lasting approximately 10 minutes in all. (House Exs. 65A, B, 3A at 386, 387-88; 66, 3A at 389-92)

90. The FBI did not use the video or audio equipment to record what occurred in Room 103 during the hour following Borders's arrest. Agents Murphy and Amoroso reported only that they initially confronted Borders with the evidence against him and that, ultimately, Borders decided not to cooperate. His initial and subsequent reactions to the arrest and confrontation during this period were not recorded or reported in any detail. (Murphy, 2A at 392-93, 395-99; Bird, 2A at 755-57; Amoroso, 2A at 1362, 1366-69, 1372-78)

91. Immediately after the arrest, the FBI in Miami dispatched ten to twelve special agents to Judge Hastings's chambers to interview his law clerks and serve a subpoena calling for the production of his records. Accounts of how the agents comported themselves differ, but certain facts are not in dispute. The secretary to whom the subpoena was addressed was not present in the judge's chambers. Agents in fact entered Judge Hastings's office and gathered such records and materials as they thought covered by the subpoena and took them from the office. (Simmons, 2A at 793-94) While the agents were in the judge's chambers, a reporter from the *Miami Herald* arrived and asked to examine the *Romano* file.

92. A further team of FBI agents was dispatched to interview Patricia Williams, an attorney at Equal Employment Opportunities Commission and a close friend of Judge Hastings, at her office. During that interview, Ms. Williams excused

herself to take a call. This occurred somewhere around 3:00 p.m. (Loucks, 2A at 758-61)

93. Teams of agents were also dispatched in Washington to serve subpoenas on Borders's law office and to look for Judge Hastings. The agents apparently had not observed his departure before noon and believed that he was still at Borders's office. Agent Murphy spoke with John Shorter by telephone from Borders's office and told him he wanted to locate and interview Judge Hastings. He asked Shorter to inform Judge Hastings if he spoke with him. (Murphy, 2A at 329-30)

94. Pride had joined Judge Hastings in his room while the judge was eating, and the judge ordered food for him also. After they had eaten, the two men went to a lounge in the hotel for drinks. Some time between 2:00 and 3:00 p.m., they returned to their respective rooms. When Pride returned to his room, he received a call from John Shorter. Shorter told him that Borders had been arrested and the charges had something to do with bribery in Judge Hastings's courtroom. Shorter also told Pride that Agent Murphy wanted to talk to the judge and gave him the name of a Washington lawyer who would assist the judge, if asked. (H. Pride, 2A at 691-94; Hastings, 2B at 2264-66)

95. Pride called Judge Hastings and asked him to come to Pride's room. The judge met Pride and his son as he got off the elevator on their floor. Pride reported his conversation with Shorter to the judge. By all accounts the judge was stunned. He asked Pride to repeat the story. Pride did.

Pride also advised the judge to return to Ft. Lauderdale and consult with lawyers he knew because he could defend himself on his "home turf." The judge acknowledged he was shocked by Pride's report. (H. Pride, 2A at 693-96; Hastings, 2B at 2266) The accounts of what transpired next differ in significant detail.

96. According to the judge, he returned to his room and made two telephone calls -- one to his mother and the other to Patricia Williams, the attorney at the Equal Employment Opportunities Commission who was a close friend. According to Pride, he accompanied the judge to his room and did not see him make any calls before he began packing. The judge's recollection of these events was confirmed by Shirley Pride, who testified that her husband had returned to the room with their son and had remained for a period before leaving to go to the judge's room, and by Mildred Hastings, the judge's mother, who recalled receiving the call. (H. Pride, 2A at 694-95, 696; S. Pride, 2B at 1792-93; Hastings, 2B at 2266-67; PT: M. Hastings, 2B at 2048-49)

97. The hotel also had no record of these calls. There was, however, a 76 minute interval from 2:54 p.m. to 4:10 p.m. during which the hotel records reflected no long-distance calls from any room in the L'Enfant Plaza Hotel. The billing records maintained by the telephone company to verify the accuracy of customer records and the hotel's long-distance records for other days in this period were destroyed within three years of the event, and thus there is no basis for veri-

fying the accuracy of the records that remain. (Avery, 2A at 821-23, 825-26; Blocker, 2A at 836-37; House Ex. 140, 3A at 605-680)

98. According to the judge, concern for his invalid mother as well as Pride's advice influenced his decision to go home. Both men agreed that Pride had been present while the judge packed and had accompanied the judge to the lobby. Pride offered to drive the judge to the airport. The judge declined and said Pride should remain with his family. (H. Pride, 2A at 695; Hastings, 2B at 2266-67, 2268-69)

99. The judge did not check out of the hotel. He reported that he understood that the room had been taken care of and that he gave Pride money to pay for the incidental charges and his suit and asked him to give the suit to one of the dinner-guests from Florida and ask him to bring it back when he returned. Pride did not recall receiving the money or the request. (H. Pride, 2A at 696)

100. The judge left the hotel and took a taxi to Baltimore-Washington Airport. The fare was $50. The judge has consistently testified that he thought that there was a direct flight from BWI to Ft. Lauderdale departing at 5:00 p.m. and that there were no direct flights departing from National Airport at this time. National Airport was significantly closer, and there was in fact a direct flight to Miami scheduled to depart at 4:30 p.m. (Hastings, 2B at 2266-67, 2268-69)

101. At 4:37 and again at 4:43 p.m., the judge called his home from a pay phone at the airport and spoke with his

mother. From 5:06 through 5:24 p.m., Judge Hastings initiated a series of four telephone calls with Patricia Williams that culminated in a pay phone-to-pay phone conversation at 5:24 p.m. The judge has consistently testified that this sequence was intended to assure that his conversation with Ms. Williams was not overheard. (Hastings, 2B at 2363-64; Stips. Nos. 186-191, 2A at 751-52)

102. Judge Hastings caught a 6:30 flight from BWI and arrived in Ft. Lauderdale at approximately 8:38 p.m. The judge rented a car. According to the judge, he drove first to his home to assure that his mother was alright. Alvoyd Merritt, the judge's uncle, was at the house to assist Mrs. Hastings. The judge went to Ms. Williams's house. Shortly after he arrived, Special Agents Lawrence Harrigan and John Simmons came to the door. Judge Hastings invited them in and agreed to talk with them. (Simmons, 2A at 768-769; Hastings, 2B at 2269; PT: Merritt, 2B at 2190-92)

103. Judge Hastings invited the agents to record the conversation. Agent Simmons reported that they were not equipped to do so and testified that as a matter of FBI policy such interviews are not recorded. By all accounts, Judge Hastings spoke freely with the agents for more than two hours. The agents' recollection of the information obtained in that interview and two subsequent telephone conversations was compressed into a three-page memorandum. (Simmons, 2A at 778, 792, 803; Hastings, 2B at 2269)

APPENDIX B

STATEMENT CONCERNING UNAVAILABLE WITNESSES AND RECORDS AND THEIR RELEVANCE

APPENDIX B

STATEMENT CONCERNING UNAVAILABLE WITNESSES AND RECORDS AND THEIR RELEVANCE

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Respondent submits this statement to identify (I) the witnesses who have died or become unavailable; (II) the records that had been destroyed and their importance to the case; and (III) the reasons why the failure to preserve the necessary testimony and records cannot be charged to respondent.

I. WITNESSES

The witnesses can be divided into two categories -- (A) those with information directly relevant to the conspiracy allegations and (B) those with information indirectly relevant to that accusation or directly relevant to other issues in the case.

A. Conspiracy Witness

Prior to September 10, 1981, there were at least eight people with some knowledge of Borders's and Dredge's activities -- Joseph Nesline, Thomas Romano, Frank Romano, Santo Trafficante, Phillip Moscato, Willie Dara, William Borders, and William Dredge. Six of these had died or become unavailable before trial. Borders refused to testify. Thus, William Dredge remained the only witness available. The relevant information concerning the six is as follows:

1. *Joseph Nesline*. All of the available evidence indicates that Nesline was a central figure in this case. He dealt with Borders from at least April 1981 and remained in contact with Borders after he went to prison. He brought Borders and Dredge together. He reportedly brought Trafficante and Borders together. Nesline eventually concluded that Bor-

ders's claim to have control over Judge Hastings was false and that Borders had, in fact, been engaged in a scam. (Dredge, 2A at 76-77; Shull, 2B at 1819-32; Robinson, 2B at 1834-45)

Mr. Nesline was adjudicated competent to plead guilty in 1986. His competency was sufficient in 1985 to merit a major undercover investigation by the FBI. (Shull, 2B at 1819-32) He was called before the Investigating Committee in 1988 (Nesline, IX Invest. Comm. at 66-80),[1] but no effort was made to compel his testimony at that time. He was not called to testify or for deposition during the House inquiry in 1987 or 1988. Based upon the material supplied by his counsel, the parties stipulated that Mr. Nesline was mentally incompetent to testify at the time of the hearings in this case.

2. *Frank Romano*; and

3. *Thomas Romano*. According to hearsay accounts, the Romanos admitted that there were at least three separate discussions concerning approaches about their case. (Sonnett, II Invest. Comm. at 126-45; *id.*, XXIII Invest. Comm. at 284-93) At a minimum, their testimony would have confirmed that the accounts Dredge has given are false. Moreover, through them, the sources from whom Nesline and/or Dredge did or might have gained access to information about their case could have been identified. (Sonnett, II Invest. Comm. at 139-41) (identifying Mattie Ayela as a Philadelphia underworld figure

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[1] Citations to transcripts of proceedings before an Investigating Committee of the Judicial Council of the Eleventh Circuit are indicated by volume and page. Copies of three transcripts and exhibits from the Investigating Committee were supplied to the Impeachment Trial Committee.

with whom they dealt). Frank Romano died early in 1985. Thomas Romano died sometime thereafter. Both were apparently willing to testify and cooperate had they been called prior to their deaths. (Sonnett, II Invest. Comm. at 146-49)

4. *Santo Trafficante*. According to Dredge, Nesline was arranging meetings between Borders and Trafficante. According to the FBI, Borders was twice-observed talking with Trafficante. No one has testified concerning the content of any conversation that may have taken place. Trafficante could have testified concerning his relationships and dealings with Nesline, Dredge, and Borders. Mr. Trafficante was still alive in April 1986. (Gonzalez, XXII Invest. Comm. at 215-16) He has since died. (Rogers, 2A at 243). Trial by indirection and innuendo was the result.

5. *Phillip "Brother" Moscato*. The hearsay account in the record suggest that Moscato may have had at least three discussions with the Romanos (see ¶3 above). The accounts of Moscato's remarks suggest that there may have been more than one scheme to extract money. Moscato refused to testify generally when he appeared before the Investigating Committee in October 1985 (Moscato, XX Invest. Comm. at 139-40). No effort was made to compel further testimony. He did testify concerning an alleged meeting between Willie Dara, another man, and himself in 1981 (*Id.*, at 146-149). His report of that conversation conflicts with the hearsay account provided by Mr. Sonnett and with the account provided by Dredge. Moscato is alive but the committee accepted the House's submission con-

cerning his present incapacity as sufficiently establishing his unavailability to justify the admission of Mr. Sonnett's hearsay account (2A at 182-83).

6. *Willie Dara*. Dredge identified Dara as his original source of information about the Romanos (Dredge, 2A at 77, 78, 79-80). Dara was present at a meeting with Moscato and saw him frequently. Dara is reportedly dead (Dredge, 2A at 79; Moscato, XX Invest. Comm. 146-49).

B. Other Witnesses

7. *Andrew Mavrides*. Mr. Mavrides was one of Judge Hastings's principal attorneys from the outset of the case in 1981. (Hastings, 2B at 2292) He continued to play that role until his emotional breakdown in 1982. (Hastings, 2B at 2305-07, 2307-08, 2309-11) He remained alive through August 1985 (Mavrides, XVI Invest. Comm. *passim*). He has since died (Hastings, 2B at 2333).

8. *Alvoyd Merritt*. Mr. Merritt testified at the judge's 1983 trial. His testimony has endured (PT: Merritt, 2B at 2185-2198); he has not (Hastings, 2B at 2333).

9. *Sylvester Goodson*. Hemphill Pride told Mr. Goodson that the judge had in fact given him $100 to pay the judge's incidentals and collect his suit. (Hastings, 2B at 2359-60) This occurred when Pride's recollection was fresh. Mr. Goodson is dead. (Hastings, 2B at 2333).

The problems resulting from delay are not confined to the death and unavailability of witnesses. Of equal significance is the differential decline in recollections and its impact.

Witnesses, such as the FBI agents, had records of their activities from which to perfect their recollections and rehearse their accounts (*e.g.*, Murphy and Amoroso). Other witnesses could refresh their recollections concerning matters addressed in 1983 or in 1985 from prior testimony to the extent possible (*e.g.*, Sonnett and Miller). Others were interviewed, but not called at the 1983 trial, and were first called to state their recollections in a suggestive environment more than four years after the event (*e.g.*, the Dabreau sisters and Ms. Myrill-Mendez). The danger here is that recollections will be reconstructed carefully and selectively in light of other testimony and the records that have been preserved (*e.g.*, Dredge).

II. RECORDS

The missing records fall into two categories -- (A) Pattern of Contacts Records and (B) Other Records.

A. Patterns of Contacts

The House claims to discern a pattern in the contacts shown by telephone and travel records that is consistent with its theory that a conspiracy was established early in 1981 and continued thereafter. The records necessary to determine whether and what theories they might support are missing.

1. *C & P Telephone Company.* Records for the first half of 1981 were not sought until 1985. By that time they had been destroyed. (Green, II Invest. Comm. at 49-51) As a result, the following records were not and could not be obtained:

a. *Borders*. The long-distance records for Borders's home and office telephones for the period January 1 through May 7, 1981. These records would be necessary to establish a more complete indication of the contacts between Borders and Pride and Borders and Judge Hastings. In the absence of these records it is impossible to confirm whether any calls from the judge to Borders may have been in response to a call from Borders or whether Borders responded to any of the calls evidenced by a message slip in Borders's office telephone logs or by calls of one minute or less. These records would also reflect the absence (or presence) of calls from Borders to Dredge and to Pride.

b. *Nesline*. There are no long-distance billing records for Nesline's telephone during the period January through October 1981. It is thus impossible to determine the contacts Nesline may have had with Dredge, Trafficante, and others from whom he may have obtained information.

c. *Madeline Petty*. The evidence suggests that Borders visited Ms. Petty's house and the House relies upon evidence of calls made to her house by Dredge and the judge. The absence of records of calls made from her phone deprives us of a further source.

2. *Hemphill Pride*. Hemphill Pride was released from prison in March 1981. He has acknowledged that he was in regular telephone contact with both Judge Hastings and Borders throughout the period from his release until October 9, 1981 (H. Pride, 2A at 678, *id*. at 710). Information specifying the

timing and duration of these calls would be essential to assessing the credibility of the pattern the House claims to see and of the explanations the judge has provided. The judge sought these records before his trial in 1983, but was not able to obtain them (Hastings, 2B at 2320, 2321). The testimony received by the Investigating Committee shows that records for 1981 were not available in 1985 (Roof, XV Invest. Comm. at 48). Ultimately, the Investigating Committee had to rely upon subscriber information records and old telephone directories to verify 1981 listings for various numbers (Roof, XV Invest. Comm. at 34-49; Bridgeman, XIX Invest. Comm. at 101-02).

3. *Airline Records.* Air Florida was one of the principal carriers between South Florida and the Washington, D.C., area in 1981. The House postulates trips by Mr. Dredge, among others, for which there is no documentation. Any attempt to reconstruct the travels of Dredge, Trafficante, Borders, and Judge Hastings would have required access to those records as well. Air Florida went into bankruptcy, and its records were no longer available by 1985.[2]

B. Other Records

The principal records identified in this category are the reservation and telephone billing records from the L'Enfant Plaza Hotel and from the AT&T/C&P Telephone Companies Hotel Billing Information System.

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[2] The record does contain information concerning Air Florida flights where the tickets included flights on other airlines. (*See, e.g.*, PT: Washington, 2A at 460, 461-462, 465-66; House Exs. 33, 34, 3A at 303-304).

1. *Loewe's L'Enfant Plaza.* The L'Ehfant Plaza was apparently filled to something approaching capacity on Friday, October 9, 1981. (Hastings, 2B at 2259-60; House Exs. 61A, B, 3A at 376, 377-379) The HOBIS records reflect no long-distance calls from any room in the hotel during the 76 minute period from 2:54 to 4:10 p.m. on that date (House Ex. 140, 3A at 605-680). The L'Enfant Plaza Hotel has a three year record retention policy (Blocker, 2A at 836-37), indicating that records necessary to test the accuracy of those admitted might have been produced through the end of 1984. Insofar as the record reflects, the records were never sought. They have never been produced.

2. *AT&T/C&P Telephone.* The HOBIS system was implemented in 1981. A major component of that system was designed to store electronically and in hard copy records of all long distance calls made from hotels that used the system. The purpose of these records was to make it possible to detect and correct discrepancies between the records generated at the hotels and those recorded by the telephone companies. The error rate must have been sufficient to justify the use of this component. The records necessary to verify the HOBIS printout for October 9, 1981, or to verify the reliability of the system at the hotel during the relevant period have been destroyed (Avery, 2A at 816, 817-823, 826).

3. *Other Records.* Judge Hastings recalls that there was a meeting of the leadership of the NBA and its Judicial Council in May 1981 (Hastings, 2B at 2222-23). There is corrobo-

ration in Borders's telephone message slips. (Resp. Exs. 31A, 32A, 3B at 2428-30, 2431-36). The NBA was able to produce no direct confirmation. Matters such as these could have been fairly explored at a time when recollections were fresher and records were current.

III. NOTICE AND OPPORTUNITY AVAILABLE TO THE RESPONDENT

The 1981 indictment alleged a conspiracy that began on or about September 10, 1981, and ended on or about October 9, 1981. Notwithstanding the judge's efforts, the Justice Department attorneys avoided producing Dredge. The Trafficante matter was kept out of that case. The judge prepared accordingly. The Investigating Committee filed its report and record with the Judicial Council of the Eleventh Circuit in August 1986. Judge Hastings and his counsel were first afforded limited access at that time.

Prior to August 1986, neither Judge Hastings nor his counsel had any notice that the judge might face accusations concerning the first half of 1981. They had no forum in which witness or records necessary to prepare a defense could be subpoenaed until the matter was referred to the House in March 1987. The judge sought a role for his counsel in shaping that investigation. He was rebuffed. He was rebuffed again at the House subcommittee hearings in May and June 1988.[3]

It is also clear that the long delay is not attributable to respondent. The Investigating Committee proceeded with its hearings while the judge's constitutional challenge to its authority was pending.[4] The Investigating Committee was still gathering testimony and records when the judge's law clerks were ordered to testify.[5] The House proceeded in the face of the litigation over the grand jury records, and there is no indication that that litigation delayed its work in any significant way.

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[3] The procedural history is recounted with supporting notes and documentation *Impeachment Inquiry, Appendix III* at 5-16, 31-48.

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[4] The Investigating Committee initiated its hearings in May 1985, promptly after it had completed such preliminary investigations as it thought necessary. *Impeachment Inquiry, Appendix I* at 5-9. Judge Hastings's initial challenge to the constitutionality of statute under which the committee was operating was not decided until August 1985. *See Hastings v. Judicial Conference of the United States,* 770 F.2d 1093 (D.C. Cir. 1985).

[5] The decision ordering them to testify was issued in February 1986 and became final when the Supreme Court denied review in 1986. *In re Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit,* 783 F.2d 1488 (11th Cir.), cert. denied 106 S.Ct. 3273 (1986). The committee held three more hearings at which testimony and documents in addition to the testimony of the witnesses involved in that litigation were received. See (XXV Invest. Comm., July 8, 1986, XXVII *id.*, July 9, 1986, XXVII *id.*, Aug. 4 and 6, 1986).

In the
SENATE OF THE UNITED STATES
Sitting for the Trial of an Impeachment

THE HOUSE OF REPRESENTATIVES,
OF THE UNITED STATES,
plaintiff,

v.

THE HONORABLE ALCEE L. HASTINGS,
a Judge of the United States District Court
for the Southern District of Florida,
respondent.

SEPARATE APPENDICES TO BRIEF FOR RESPONDENT JUDGE ALCEE L. HASTINGS

APP. C: DETAILED STATEMENTS AND ANALYSES OF THE EVIDENCE AND THE MANAGERS' ARGUMENTS

APP. D: MISCELLANEOUS MATERIALS; DUE PROCESS

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APPENDIX C

DETAILED STATEMENTS AND ANALYSES OF THE EVIDENCE AND THE MANAGERS' ARGUMENTS

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PREFATORY NOTE

The *Report of the Impeachment Trial Committee* (the "Report") presents a diligent and balanced statement of the evidence from a neutral perspective. Some of the events are juxtaposed in the way the House would juxtapose them as a basis for the further inferences it would ask Senators to accept. Others are juxtaposed in the way the judge would juxtapose them to demonstrate they are consistent with and support his claim that he is innocent.

The Comprehensive Statement is also a balanced statement, but it is balanced from a different perspective. Throughout, events are juxtaposed and set in a context that respects the presumption of innocence. Balance is achieved by the inclusion of events the House claims are material, reported in a context that also respects the presumption of innocence. It was offered to aid Senators in assessing, at a more detailed level, whether the House has carried its burden of rebutting the presumptive juxtaposition and proving that the juxtapositions that it urges are the proper juxtapositions and, if so, whether the juxtapositions provide the necessary support for the further inferences the House urges in support of its claim that the judge's guilt has been established with the degree of certainty that should be required.

The *Post Trial Memorandum of the House of Representatives* devotes almost 100 pages to presenting a detailed statement of the House's view of facts that can be culled from the evidence and marshalled to support its claim that the evidence establishes the judge's guilt with respect to the main accusation, the conspiracy alleged in Article I. The detailed statements and analyses that follow meet the House on its own terms. In the first part, we present the facts and marshall them in support of the judge's case: The judge is an innocent man. In the second, we analyze arguments advanced by the House in more detail to demonstrate that the case against the judge remains six years after the fact exactly what the jury saw it as: A circumstantial case that is "shaky at best" provoked by "an investigation that did not finish."

I. MORE DETAILED STATEMENTS OF THE EVIDENCE CONCERNING ARTICLES I - XV: THE ALLEGED CONSPIRACY AND PERJURY ACCUSATIONS

A. Before 1981: Necessary Background

1. *Judge Hastings*. The Report does not and probably could not adequately convey the evidence presented concerning Judge Hastings's record as a man and a judge and his character as conveyed in the opinions and by his reputation among those who know him best. The statement of the evidence presented there does need to be supplemented in at least two respects.

a. *The Character of the Man*. It was not merely witnesses called by Judge Hastings who attested to the judge's character and reputation, and the list identified in the Report is far from complete. Neal Sonnett, the lawyer who represented the Romano brothers in post-trial proceedings and the appeal in the *Romano* case was called by the House to offer testimony against the judge. Sonnett was a former Assistant United States Attorney who had served as Chief of Criminal Division in the Office of the United States Attorney in the Southern District of Florida before entering private practice. Sonnett is a member of the ABA House of Delegates, a past-president of the Dade County Bar Association and president-elect of the National Association of Criminal Defense Lawyers (the "NACDL"). Sonnett has practiced before Judge Hastings and before other federal judges in Florida and throughout the nation.[1]

Based upon those experiences, Sonnett ranked Alcee L. Hastings as an outstanding district court judge and confirmed that his opinion was corroborated by the judge's reputation among other experienced federal practitioners. Based upon his experience, Sonnett declared that he had confidence in the judge's integrity and honesty and that his opinion on these points was also corroborated by the judge's reputation among other experienced practitioners.[2]

Sonnett also expressed an opinion based upon his years of experience as a prosecutor. In Sonnett's view, the FBI's decision to arrest Borders at the scene of the payoff, when no money had gone to the judge and when there was no direct evidence of his guilt, was an outrageous departure from the investigative and prosecutorial standards that should have been observed.[3]

Sonnett was no stranger to the accusations. He had become involved after Borders's arrest and had been called before the committee of five judges who conducted the post-trial investigation (the "Investigating Committee"). He had served as a member of the NACDL board while the matter was under study there. He had lived and practiced in Miami throughout. He had agonized about the case over the years. When pressed he expressed his reasoned view that the judge was innocent.[4]

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[1] Sonnett, 2A at 199-200, 207; Resp. Ex. 7, 3B at 2344-50.

[2] Sonnett, 2A at 206-07, 214.

[3] *Id.* at 208-09.

Then there was Jeffrey Miller. Miller was the young man who had interned in the chambers of District Judge James C. Paine of the Southern District of Florida during his third year in law school and who had been hired by Judge Hastings to serve as one of his clerks after his graduation, from September 1980 to September 1981. Miller was the law clerk whose performance had been such that Judge Paine had invited him to return to his chambers as a clerk upon completion of his term with Judge Hastings.[5]

Miller was the clerk who had lived with the *Romano* case; who was with the judge on dates that have been identified, after the fact, as significant; and upon whom the burden of recounting and reliving his experiences has now been imposed at least five times over the past eight years. By the time Miller was called here, he was a former law clerk who had acquired eight years experience and perspective as a trial lawyer.[6]

This much imposed upon Miller had observed the judge during the critical year. He had observed the man, and he identified the facts that underlay his opinion that this was a man for whom concern for financial success was far subordinate to concern for his family, his community, and his court. Miller also expressed his opinions and attested to Judge Hastings's reputation as an outstanding judge and a man of the highest integrity and honesty. Notwithstanding the years and the impositions, Miller's confidence remained unshaken. He still clearly believed in the judge's innocence. In his words: "And I will tell you that if we lose Judge Hastings as a judge, it will be a sad day in the Federal court for south Florida. It will be a sad day."[7]

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[4] *Id.* at 214, 222, 230.

[5] Comp. St. II, ¶¶ 5, 51.

[6] Comp. St. II, ¶¶ 5, 21, 34, 35, 38, 50, 74, 80; Miller, 2A at 611, 625, 636.

There was also David Thomas, the young man who had met his prominent cousin, William Borders, at the airport and driven him to the family reunion in West Palm Beach. This was a young man who had emerged into adulthood, not as a lawyer, but as a citizen who could recount the admiration and respect with which he and others viewed the judge then and now. Whatever his views on the accusations establishing his cousin's corruption, the accusations against Judge Hastings had not altered his view.[8]

The evidence concerning Judge Hastings's character did not come merely from those called for that purpose; it came also from others. Others such as Dr. Andrew Chisolm, the man who had served as Director of Minority Affairs in the Carter presidential campaign and had met Borders in that capacity.

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[7] Miller, 2A at 634-636.

[8] Thomas, 2A at 430-32; *see also* PT Goldstein, 2B at 2086-87.

He could attest that the judge's reputation as a charismatic political figure in the mid-1970's was such that Chisolm was told the presence of Alcee L. Hastings diminished the need for concern about the Black vote in Florida. There were others such as Dr. Roy Phillips, a Vice-President of Miami Dade Community College, who had been present at the MMAP conference on September 6, 1985, and who had seen the judge exit through the service doors without going into the audience. They too, had opinions or knew the judge's reputation in the larger community, and they too shared his views with the Senate.[9]

In addition to the testimony summarized in the Report, Martin R. Raskin also attested to the judge's ability and reputation. Raskin had been the Chief of the Criminal Division in the Southern District of Florida in 1981 when the investigation was undertaken. He had prosecuted a major case involving sensitive information before Judge Hastings. As the Report notes, he and the then-United States Attorney Atlee Wampler had jointly expressed their outrage and disagreement when the Justice Department advised them, the day before the arrest, that the decision had been made to arrest Borders at the scene of the payoff rather than letting the money run to see if any would go to the judge. But Raskin too had an opinion of the judge's ability, his integrity, and his honesty. He too was familiar with the judge's reputation among experienced practitioners in the Southern District of Florida. He too shared his opinions and reports with the Senate.[10] They should be heard and seen.

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[9] Chisolm, 2B at 1885-86; Phillips, 2A at 1388-89; Ruiz, *id.* at 1281.

The Impeachment Trial Committee early cautioned Judge Hastings to limit the number of character witnesses he called to a reasonable number. The admonition was unnecessary in this case. Except for those who had interest in the outcome urged by the House, virtually all the witnesses who knew the man and appeared had opinions and knew his reputation.[11] These views did not differ. This is an extraordinary man by any measure. The managers recognize as much when they acknowledge that the judgment they seek would represent an "enormous tragedy, both for the nation and Judge Hastings."[12]

b. A Question of Standpoint: The House invites the Senate to engage in after-the-fact speculations on the reasonableness of the judge's behavior on various occasions in 1981. Should the fact that the judge, Jesse McCrary, and their guests had not gone to dinner and were still socializing over drinks and snacks in their suite at the Sheraton at 10:00 p.m. on a Saturday evening, September 12, be viewed as so extraordinary as to incite suspicion that they were waiting for someone? Should Judge Hastings have made more (or fewer) attempts to locate Borders to demonstrate the truth of the judge's claim that Borders had asked the judge to meet him at the Fontainebleau on September 16? Or would a more (or less) extensive series of actions have merely been construed, after-the-fact, as the conduct of a man trying to establish a cover?

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[10] Raskin, 2B at 1891-95, 1896-1902.

[11] *See* Rep. at 24 (for identification and summary of other); *see also* M. Perry, 2B at 1732-33 (federal judge, acquaintance, fellow NBA member); B. Williams, *id.* at 1747-48 (judge's secretary for nine years); S. Pride, *id.* at 1794 (H. Pride's former wife); PT Gary, *id.* at 1949-52 (South Florida lawyer); Stewart, *id.* at 1960-61 (same).

[12] Post Trial Memorandum of the House of Representatives ("House Mem.") at 1.

Should the seventy-nine word recorded conversation between the judge and Borders be taken at face value? Or should it be assigned a darker meaning? Was the shock with which the judge reacted and his conduct in going home on October 9 after he had learned that the FBI had arrested Borders and that its accusations concerned bribery in his courtroom a reasonable response by a man who had just received shocking news? Or did it evidence a guilty state of mind?

Questions such as these are explicitly and implicitly scattered throughout the House's arguments. They call upon Senators to speculate about the reasonableness of the judge's behavior and his explanations in light of unspecified norms about how reasonable persons would behave in the same or similar circumstances. If these questions merit consideration at all, the norms that must be observed in this case should be clearly understood.

Judge Hastings is black. He was born black 52 years ago. He was educated and reared black. He entered his profession and political life early in the struggle to break down the legal barriers that kept blacks out of white society. He had participated in the battles and seen full-face outrageous actions directed at black leaders, such as the FBI's surveillance and attempted character-assassination of Martin Luther

King. He and Borders were career-long members of the National Bar Association, the small, close-knit association of black lawyers formed in an era when blacks were not welcome in the profession. Both were black lawyers who had overcome barriers to obtain prominent positions in an essentially white establishment. They, too, were black leaders in 1981.[13]

The Senate may and must judge Judge Alcee L. Hastings. But any Senator who would engage in speculative inquiries such as those posed by the House must, in fairness, judge Judge Hastings for what he was and is and assess his conduct from the standpoint of one in his position. The Report recognizes the point and its potential significance in addressing an issue identified as significant.[14] The point is one which should be taken and recalled by all and throughout.

2. *William Borders*. The evidence makes it clear that there were two William Borders. One was the William Borders who was known among friends, prominent members of the professions, and persons high in the Democratic Party and the Carter administration as an ambitious young man who had risen to a position of prominence in his profession and his party. The cryptic nature of this William Borders's conversations and his eccentric insistence on using pay phones for routine conversations even with prominent persons had been noted as early as the mid-1970's, but had excited no suspicion. Prior to October 9, 1981, this William Borders was uniformly viewed as a man of high integrity and honesty among his friends and

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[13] Comp. St. I, ¶¶ 1-10, 23, 24, 25.
[14] Rep. at 122.

associates in high office and prominent positions.[15]

There was another William Borders. This was the Borders who associated with the likes of Joseph Nesline and William Dredge and bragged that he could fix cases before judges in Washington and elsewhere. This was the Borders who was a criminal lawyer who had no files and wrote no pleadings. The FBI had information concerning this Borders's "rainmaking" claims with respect to judges other than Judge Hastings, other judges of unquestioned integrity.[16] Dredge's contribution was merely to add the judge to the list.

The FBI had reason to doubt before October 9, 1981;[17] but none of Borders other professional and political associates perceived this darker side of Borders prior to that date. Senators must assess the reasonableness of the House's claim that Judge Hastings should be held to a higher standard and that he must have had knowledge about Borders's dark side throughout. The fact that there were two William Borders bears upon that assessment. The House has never explained why the judge should be held to a higher standard of perception than others in responsible positions who knew and were close to Borders.

3. *Hemphill Pride*. Pride was a convicted felon who had been suspended from the bar. His overriding concern throughout the period relevant to this case was avoiding permanent disbarment and one day regaining his license to practice law.

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[15] Comp. at St. I, ¶¶ 23, 25, 26.

[16] Comp. at St. I, ¶¶ 27, 28.

[17] Comp. St. II, ¶¶ 42, 43.

Apart from Borders and Dredge, he was the only witness who, insofar as the record reflects, came to the hearings accompanied by counsel.[18]

Pride acknowledged that he had regularly spoken with Borders and Judge Hastings by telephone following his release from prison. He acknowledged that he consulted them regularly concerning his desire to regain admission and how best that goal might be achieved. He acknowledged that Borders and Hastings had taken actions to assist him before without prior consultation and without seeking his prior approval. He acknowledged that he was in desperate financial straits and that Borders knew it. Pride's testimony suggests that his concern over the draft "letters for Hemp" stemmed from his view that Borders had planned a solicitation and had urged the judge to act, without consulting Pride, which would have injured rather than enhanced Pride's prospects for readmission, rather than from any serious doubt that this was the kind of effort that Borders and the judge might well have initiated without prior consultation.[19]

The House managers urge what they describe as "unequivocal" propositions from Pride's testimony as supporting their theory. Pride testified and probably believed that he was the judge's friend. But Pride was also a man driven by perceived self-interest. He was the kind of man who, to curry favor, would secretly record a telephone conversation with his best friend and deliver the tape to the FBI without ever disclosing to his best friend what he had done. Pride is a man who is defined by his conduct and trapped by his story. Senators should be cautious in assessing the House's claims that those of Pride's assertions it views as implicating the judge should be given more credit or weight here than they were when he testified before the jury in 1983.[20]

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[18] Comp. St. I, ¶¶ 14, 17, 18, 19; Pride, 2A at 685.

[19] Comp. St. I, ¶¶ 13, 15, 17, 19, 20; II, 10, 24, 52; Pride, 2A at 702, 707-12, 717-19.

4. William Dredge and Joseph Nesline. The Report fairly summarizes what is known about these two career criminals. A few additional points need to be highlighted here. Borders had apparently known Nesline for some time before Dredge entered the picture. At some point, Borders apparently made his rainmaking claims known to Nesline. Nesline was, if the FBI is to be credited at all, a man who could have identified the Romano brothers as potential "customers" who might purchase Borders's alleged services. Nesline had the resources to gather information about the Romanos and the status of their case at any time. Nesline's underworld connections extended to South Florida and included ranking members of the Genovese organized-crime family, if the FBI is to be believed.[21]

Whatever his other attributes, Dredge apparently had similar ability to gather reliable information and probably could have found out about the *Romano* case and their lawyer's views directly, from their associates, or from Nesline.[22] These facts are important for those who seek to discover how Borders might have obtained his information and place his deal with Rico/Romano.

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[20] Comp. St. I, 20; Pride, 2A at 703-05, 712-15, 721-22, 728; PT: H. Perry, 2B at 1981-85.

[21] Comp. St. I, ¶ 28; Dredge 2A at 76-77; Shull 2B at 1823-24.

[22] Harmon, 2B at 1867-68.

5. The Romano Case and the Romanos. The evidence concerning the Romanos is necessarily fragmented, and they are both now dead. There is a view of the Romanos, held by Sonnett, that the Romanos were essentially decent men who would have been acquitted had they been retried. In that account, the Romanos were character witnesses for the judge who thought him incorruptible and fair. There is another view, advanced by Dredge, that the Romanos were underworld figures affiliated with the Genovese organized-crime family. In that view, the Romanos would have been fully capable of deceiving their lawyer and pursuing a corrupt scheme with Nesline, Dredge, or others. There is scattered support for both views in the fragments that remain.[23]

The point is important. Nesline is incompetent. The Romanos are dead.[24] Something was going on, but it is no longer possible to do more than speculate about what. The House would have the Senate accept speculations suggested by incomplete data as established fact because those speculations form a significant part of the foundation upon which its house of cards is built. The fragments can be marshalled to the contrary, however, and it should be clear that, if speculations are to be indulged here, only those that favor the accused may be favorably considered. That is what any proper application of the burden of proof and the presumption of innocence would require.

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[23] Sonnett, 2A at 199, 211; Dredge, 2A at 77-78; App. B at 2.

[24] App. B at 1-4.

B. The Relevant Events Of 1981: The Innocent Account

1. *The First Half of 1981: February 20-June 30.* The House alleges that the conspiracy was formed "sometime in the first half of 1981." In support of this theory, its managers have produced telephone records showing twelve telephone calls -- one three-minute call, five message slips, and six calls lasting a minute or less -- calls that occurred over a fourteen week period from February 20 through May 29, 1981. Over the same period, the evidence shows that there was activity in the *Romano* case on seventeen different dates. Most of the telephone contacts indicated preceded or followed an event that occurred in the *Romano* case. Given the number of events that occurred in the case, it probably could not have been otherwise.[25]

Even at this late date, the judge has identified events that also coincided with or accounted for the indicated contacts -- the NBA/Judicial Council meeting in Miami in late February; Pride's release from prison in March; an April proposal for the NBA/Judicial Council annual meeting in July; President Reagan's decision to remove Borders from office and the South Carolina Supreme Court's decision not to permanently disbar Pride in May. He has testified that these events were the principal topics of discussion in his conversations with Borders during this period, and that they never discussed the *Romano* case. The fragmentary records that remain support a reconstruction that is wholly consistent with the judge's testimony and innocence.

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[25] Comp. St. II, ¶¶ 7, 8, 10, 12, 13, 14, 19, 23, 24; House Ex. 2, 3A at 3-16.

a. *The February 20 call.* The midwinter meeting of the Board of Governors of the National Bar Association and the NBA Judicial Council was scheduled to be held at the Carrillon Hotel on Miami Beach from February 26 to March 1, 1981. Borders was president of the NBA and had planned to attend. Judge Hastings was scheduled to be the keynote speaker for the Judicial Council Meeting and planned to host a small reception for friends and visiting dignitaries, including Borders. The judge called Borders at 7:30 a.m. on Friday, February 20, to coordinate their respective schedules during the meeting and to discuss the meeting itself. They spoke for three minutes or less.[26]

b. *The April 9 call.* Pride was released in March, and he promptly resumed regular telephone contact with the judge and Borders. Pride called Borders's office at least twice on April 9, leaving messages both times. Even in the absence of any records, it seems safe to conclude that he also wanted to speak with the judge. The judge called Borders's office that morning and left a message for Borders to call him "between 12:00 and 1" that day. If the House's undocumented speculations are correct, Borders called the judge from a pay phone at the federal courthouse and, as he had with prominent friends since the mid-1970's, asked the judge to call him from a pay phone. In this view, the judge indulged his friend's eccentricity and went down the corridor to a pay phone outside his office. The judge's lack of concern is evidenced by the fact he charged the call to his home telephone. In any event, if the House's speculative reconstruction is true, the two men devoted a minute or less to discussing whatever concerns had motivated Pride to call.[27]

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[26] Comp. St. II, ¶ 7.

c. *The April 27 - May "Cluster."* On April 21, the judge proposed that a fund-raising dinner be held for the NBA Judicial Council at the annual meeting in Detroit the following July. He suggested that, through Borders, the NBA should try to get President Jimmy Carter and/or former Attorney General Griffin Bell to attend a dinner honoring them for their efforts to appoint qualified minorities to the federal bench. The judge sent a copy of the proposal to Borders, asking for his views and reminding him of a report that the two men were supposed to be preparing. According to the judge, he understood that there was to be a meeting of the NBA leadership in Los Angeles over the weekend on May 5 when this proposal would be discussed. There are indications in the record that corroborate the judge's recollection.[28]

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[27] Comp. St. II, ¶ 12; House Ex. 31I, 3A at 283.

[28] Comp. St. II, ¶¶ 13, 14; Hastings, 2B at 2222-26. The message slips from Borders contain a message from Warren Hope Dawson asking Borders to coordinate his flights so the two men could travel together to Los Angeles on May 2. Resp. Ex. 31, 3B at 2430. Mr. Dawson was a special assistant to Borders during his presidency of the NBA and a member of the "Host Committee" for the NBA annual meet-

The judge called and left messages at Borders's office on April 27 and 30 and on May 1 and 4, the last one being marked "urgent." The judge also apparently tried to reach Borders in the aftermath of the Los Angeles meeting. He called the home of one of Borders's friends, a Madeline Petty, shortly after midnight on May 6 and left a message at Borders's office on May 7. He tried again on May 11, first calling Borders's home at 6:27 a.m., and then Ms. Petty's home at 6:28 a.m.[29]

All of these calls resulted in a message slip or lasted a minute or less and these do not provide a basis for determining whether the two men spoke. So too, Borders's telephone records prior to May 7 are missing and it is, of course, possible that Pride, whose records are also no longer available, or others had called with information or concerns that the judge thought he and Borders should discuss. At this stage, the only plausible speculation from the data that remain is that the judge was following up on his proposal and wanted to discuss the report that he and Borders were supposed to complete and, perhaps, to discuss Pride and his problems.[30]

d. *The May 29 Calls.* Two events occurred in the latter half of May that provoked discussions between the judge and Borders. On May 16, President Reagan sought to remove Borders from his office as a member of the District of Columbia Judicial Nominating Commission before the expiration of Borders's term, an event the judge recalled discussing with

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ing that year. Resp. Ex. 75, *id.* at 2595, 2607-08.

[29] Comp. St. II, ¶ 14.

[30] *Id; see also* App. B at 6-7.

Borders. On May 26, the South Carolina Supreme Court issued a 3-to-2 decision determining that Pride's conviction merited only indefinite suspension other than permanent disbarment. Pride and the judge both recalled this as an event that generated considerable relief and cause for discussion among Pride, Borders and the judge. The available records record only two calls during this period, both in the morning of May 29 from Borders's residence to the judge's home and office respectively. Each lasted a minute or less. If the two men spoke on that occasion, the decisions by the President and by the South Carolina court and what should be done in light of them were what they spoke about.[31]

The House asks the Senate to discern a pattern in the partial data the managers have presented that overwhelms the obvious pattern established by the innocent events and the explanations provided by a judge who has earned over a lifetime a reputation as a man of integrity and honesty of the highest order.[32] This is improper.[33] The required analysis

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31. Comp. St. II, ¶¶ 23, 24.
32. The House's request depends in significant measure upon the testimony of William Dredge, the career criminal who claimed in 1981 that he had known Borders for years, when that version served his interests; who recalled in 1985 that he had first met Borders in early May, when his interests were unclear; but who recalled in detail in 1989 that the first meeting occurred in March, after he had eighteen hours to study the reconstructed data and master the revised theory now being advanced. Dredge is a significant witness, but not for the House's case. Dredge's role and credibility are discussed below.
33. In any other tribunal, civil or criminal, Article I would have been dismissed for lack of sufficient evidence to support an essential allegation. The traditional rules of pleading, practice, and evidence have evolved to prevent such variances between the pleading and proof and avoid evidence that invited the tribunal to substitute

is developed below.

2. *The Further Account of an Honest Man: July 1 - October 7.* The events that brought the two men together or justified communication in July and thereafter and the judge's explanations are consistent and thoroughly plausible.

a. *The Events of July.* Borders was scheduled to be in Miami on July 11 and wanted to socialize with the judge and Jesse McCrary. The judge was scheduled to be in Washington from July 17 to 20 for a meeting of an American Bar Association standing committee on which he served. On July 7, the district court in Washington ruled in Borders's favor in his suit against the president. The judge called Borders on July 5 and again on July 7. If he spoke to Borders in either of these minute-or-less calls, the most probable topics were Borders's upcoming trip to Miami or the status of his suit against the President or both. The judge called again on July 9 and 16. On the 9th, he left a message advising Borders of the judge's schedule for returning to Miami from Key West, Florida, where he had been hearing cases. The conversation on the 16th, if any, related to the judge's arrangements to travel to Washington for the ABA meeting and his schedule while he was there.[34]

Borders visited with the judge and McCrary while he was in Miami on July 11. The judge had lunch with Borders and an-

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speculation for proof. The Senate's rules do not cover matters such as these. The House has taken advantage of the deficiency by simply ignoring established principles of pleading and proof that its managers found inconvenient.

[34] Comp. St. II, ¶¶ 31, 32, 44.

other lawyer, and Borders agreed to join the judge and others for dinner while the judge was in Washington for an ABA standing committee meeting from July 17 to July 20. Borders did not appear for the dinner and offered no explanation for the failure.[35]

Both men attended the annual meeting of the National Bar Association in Detroit at the end of July. Pride had not come. Borders, the judge, and others called Pride to urge him to come. Borders discussed Pride's financial distress and "passed the hat" to raise immediate funds. The judge contributed. During that meeting, Borders accelerated and thereafter persisted in insisting that the judge should circulate a letter soliciting funds, as well as a letter to generate character references, for "Hemp" -- Hemphill Pride, the longtime friend in desperate need -- notwithstanding any ethical reservations the judge might have.[36]

b. *September 1-10:* The judge and Jesse McCrary had made plans to spend a social weekend together in Washington on September 12 and 13 when they discovered that their respective travel plans made this convenient. The judge was aware that Borders planned to be in Palm Beach, Florida, that weekend to attend a large family reunion. The judge had planned to fly to Washington on September 10, but an on-going jury trial had forced him to cancel that portion of his plans. It was also during the first week in September that Pride finally met with the South Carolina Chief Justice. Pride called Borders and the judge to review this meeting. Pride also planned at least one trip during September during which he stopped in Washington and visited with Borders.[37]

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[35] Comp. St. II, ¶ 39. 40.
[36] Comp. St. II, ¶ 44; Resp. Ex. 75, 3B at 2587-2645.

The judge called Borders's office on the morning of September 10 and left a message reporting that he would not be coming to Washington that day and asking Borders to call between 4:30 and 5:00 p.m. that afternoon. Borders called the judge's chambers at 4:40 p.m., but the judge was still on the bench. The judge called Borders's office at 5:30 p.m., during a recess, and left word that Borders should call and have the judge's staff get him off the bench. Borders returned the call a few minutes later, and the two men talked for four minutes or less. The most plausible inference is that they talked about the judge's change in travel plans; if and when the trial was likely to end so the judge could fly to Washington; and Pride's status and what should be done to aid him.[38]

c. *September 11-14.* The trial ended earlier than expected on September 11, and the judge went to the airport to catch a 3:48 p.m. flight to Washington. The flight was twice delayed and the judge twice called Borders's office leaving messages advising him of the delays. He also called Shirley Ross, a friend who had made arrangements for his hotel accommodations and with whom he was to have dinner that evening. The two men did not talk. The judge's flight finally arrived in Washington shortly after 8:00 p.m. The judge's luggage was delayed, and his cab driver had difficulty finding the residence of Shirley Ross. The judge picked up Ms. Ross, and they went to the hotel by cab. The judge and Ms. Ross arrived at the Sheraton shortly after 10:00 p.m.[39]

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[37] Comp. St. II, ¶ 52, 53, 54; Pride, 2A at 709. The House reports that its copies of the record reflect a call from Borders to the judge on September 1, the period immediately proceeding Pride's second attempt to meet with the Chief Justice of the South Carolina Supreme Court and sometime before the trip during which Pride visited with Borders. House Ex. 27b, however, has lines blocked out in the copy reproduced in the record (3A at 259-65) and in the copy supplied to counsel for the judge. The call cited by the House is not shown in the legible portions of this exhibit. If there was a call and if Borders and the judge talked, they talked about Pride and his problems.

[38] Comp. St. II, ¶¶ 56; Stip. Nos. 207, 211-13, 2A at 894-95.

The judge and Jesse McCrary spent Saturday, September 12, socializing as planned. They invited friends to join them that evening. Between 7:00 and 8:00 p.m., a party of five assembled at the suite the two men shared -- the judge, McCrary, Donna Myrill, Pearl Dabreau, who brought her sister Margaret to the party. The group was still socializing at 10:00 p.m. when Borders unexpectedly arrived and joined the party.[40]

During that weekend, Borders told the judge he would be in Miami the following Wednesday, September 16, and asked the judge to meet him in the main dining room at the Fontainebleau Hotel at 8:00 p.m. that evening. The judge agreed. The judge and his date, Essie Thompson, arrived at the hotel at 7:45 p.m. The judge left word with the maitre d' and a hostess that he was expecting to meet a friend from Washington. After they had been seated, he went to another restaurant and lounge on the same floor to look for Borders and leave word. Upon his return to his table, the judge reported to Ms. Thompson that he had been looking for "friends from D.C.". Borders again failed to appear.[41]

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[39] Comp. St. II, ¶¶ 56, 58.
[40] Comp. St. II, ¶¶ 62- 63.

The judge later recalled a telephone call from Borders on September 20 or 21 that is not reflected in the available records. This was the period during which Borders was pressing the judge to write solicitation letters on behalf of Pride. The judge asked Borders why he had not shown up at the Fontainebleau. Borders again gave no explanation. The two almost certainly discussed what should be done to aid Pride.[42]

d. *October 5*. On October 5, during the course of presiding over a jury trial, the judge briefly succumbed to Borders's persistent requests and drafted two proposed letters for Pride and a covering letter to Pride asking him to review and comment upon the proposed drafts. At the end of the day after his secretary had left, the judge called Borders, told him he had drafted the "letters for Hemp" and asked whether Borders had talked with Pride to verify his needs since last they had spoken about the matter. Borders led the judge to believe matters were well in hand -- that Pride had written some things down for him and that Borders was to go back for more information. Thus reassured, the judge responded that he saw "no great big problem" and that he would send the proposed drafts to Pride in Columbia, South Carolina, the following morning so that Pride might review them.[43]

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[41] Comp. St. II, ¶¶ 64. 65; Thompson, 2A at 521.
[42] Comp. St. II, ¶ 70.

Over the evening, the judge reflected further and again concluded such solicitation letters would be improper, given his position as a federal judge. He decided to explain his decision to both Pride and Borders the following weekend when the three were together in Washington for the long-planned dinner-cruise to honor Borders for his work as president of the NBA. The drafts remained in his desk untyped.[44]

3. *Events in the Romano Case.* The *Romano* case was only one of the many cases for which the judge was responsible in 1981. It was neither the most important nor the most pressing. The trial was over. What remained were post-trial matters. In contrast, like all members of his court, Judge Hastings had to give priority to the crushing load of criminal matters that had to be tried within the speedy trial guidelines Congress had established and to those civil cases that presented emergencies or where the passage of time had created a substantial risk that justice delayed would be justice denied. Post-trial motions, forfeiture hearings, and sentencings, however important, had to be scheduled and addressed within the framework of the court's other business and other priorities. Even at this late stage, however, the judge has been able to provide explanations that are wholly consistent with his innocence and that, in large measure, are corroborated by the testimony of others.45

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[43] Comp. St. II, ¶¶ 75, 76, 77, 78.
[44] Comp. St. II, ¶ 79; Hastings, 2B at 2309-10.
[45] Comp. St. I, ¶ 1.

In December 1980, a jury had found the Romanos guilty of violating the RICO statute. The government had claimed that an interest in a motel and monies they had allegedly derived from their illegal activities were subject to forfeiture under that statute. The forfeiture issues had been tried before the judge and briefs had been submitted by early April. On May 4, 1981, the judge had adopted the government's position and adjudged forfeit an interest in the Sea Inn Motel valued at $316,000 and cash in the amount of $846,000.[46]

Final disposition and sentencing had been scheduled for Monday, May 11, and the judge was ready to proceed. Neal Sonnett, the lawyer who had agreed to take over the case and handle the appeals appeared and asked the court to allow additional time so that he could supplement the post-trial motions filed by his predecessor in order to properly develop the issue he wanted to preserve for review. Sonnett's commitments in other cases had prevented him from reviewing the *Romano* file in time to give notice to the court and opposing counsel of his intent to seek a continuance. He apologized. The judge accepted the apology, and over the opposition of James Deichert, the prosecutor, granted a short continuance. Deichert, however, had commitments in June, and the judge agreed that he and Sonnett should work out an acceptable date for the final hearing and advise his clerk.[47]

Based upon counsels' agreements, the clerk scheduled the final hearing for July 8. On June 19, 1981, after Sonnett had supplemented the post-trial motions and filed a motion to reconsider the May 4th forfeiture order, the court of appeals had issued a decision, *United States v. Martino*, ruling that cash proceeds were not subject to forfeiture under the RICO statute. The Romano's brief addressing *Martino* and its application to the May 4th order was not filed until Monday, July 6. Both the *Martino* decision and the subsequent briefs were routinely routed to Jeffrey Miller, the judge's law clerk responsible for the *Romano* file.[48]

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[46] Comp. St. II, ¶ 6, 19.
[47] Comp. St. II, ¶¶ 19, 20, 21; House Ex. 4, 3A at 18-37.

The *Romano* case was one of several scheduled for hearings on Wednesday, July 8. The judge had set the matter for argument on all post-trial motions and sentencing. Between cases, and shortly before the *Romano* case was called, Miller briefed the judge and gave him handwritten memoranda on the pending motions. The judge was a "quick study", but had had no opportunity to read the *Martino* decision. Based on Miller's briefing, he questioned counsel during argument, stating that he had read *Martino*. During the hearing, he denied the Romano's motion for a new trial; announced that he would deny the motion to reconsider the forfeiture, but would issue a brief order explaining that decision in light of the new cases that had been decided; and entered judgments of conviction and sentenced the Romanos to three-year prison terms. After the hearing, the Romano's lawyer told his clients that he did not think the judge had in fact read *Martino* and that he thought that, when the judge did, he would probably reverse his position.[49]

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[48] Comp. St. II, ¶¶ 20, 27, 28, 34.

After the hearing, the judge told Miller to draft an order on the forfeiture. Miller understood that the judge wanted to stand by his initial forfeiture decision, but only if the law of the circuit permitted. Miller could not find a way to justify that result. Instead, he prepared an extensive draft order that would have required the parties to brief the issue further. He did not finalize or show this draft to the judge. He set the file aside at the end of July, and work that he was required to do on other cases in August prevented him from returning to it.[50]

On August 27, the court of appeals issued a further decision, *United States v. Peacock.* The court reversed a district judge who had failed to follow *Martino*, noting that it was and would remain the law of the circuit unless and until it was reconsidered or reversed. Early in September, Miller discussed the *Peacock* decision with the judge and advised him that the law of the circuit required that he vacate the money portion of the *Romano* forfeiture. The judge agreed and instructed Miller to prepare an order that did this, but that also made clear the judge's disagreement with the decisions he was applying. By all accounts, this discussion and the judge's instruction took place before September 10.[51]

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[49] Comp. St. II, ¶¶ 35, 36, 37, 38.
[50] Comp. St. II, ¶ 38.
[51] Comp. St. II, ¶ 50.

Miller continued to work on other matters. The judge did not press him, and he had not completed the *Romano* order by early October. At that point, the delay did become a matter of some concern to the judge. Miller had been scheduled to complete his clerkship with Judge Hastings in September and to begin a second one-year clerkship with another judge on that court, the Honorable James C. Paine. Judge Hastings had had difficulty in the past when a clerk had left before completing her assignments. At the judge's request, Judge Paine had agreed that Miller could remain in Judge Hastings's chambers beyond the end of September, if that was necessary to enable him to complete his work. In addition to this problem, Judge Hastings was scheduled to leave Miami on October 7 and had an itinerary that was to keep him out of his chambers for most of the rest of the month.[52]

On Monday, October 5, Judge Hastings asked Miller about the *Romano* order. When he was told it was not complete, the judge told Miller he wanted it out that day. Miller devoted his full attention to the task. The July draft was revised and converted into an order that complied with the judge's instructions. That order was completed, signed, and mailed late the following day, October 6. In order to complete an on-going jury trial, the judge held court until 9:30 p.m. that evening. When that trial ended the following day, the judge left for Albany, Georgia, where he was scheduled to speak on

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[52] Comp. St. II, ¶¶ 51, 71, 74; PT Goldstein, 2079-83; Resp. Ex. 97, 3B at 2672.

Thursday, October 8.[53]

4. *The Events of October 9.* In August, plans had been made to hold a dinner-cruise to honor Borders for his service as president of the National Bar Association. Prominent lawyers and judges were to be invited from around the country. The judge was asked and agreed to act as a sponsor. In September, the organizers fixed Friday, October 9, 1981, as the date on which the gala celebration would be held, and the judge made plans accordingly.[54]

The judge called Borders from Albany, Georgia, on October 8. The two men talked about the judge's plans to fly to Washington the following day for the long-planned dinner-cruise honoring Borders and about the judge's inability to get a reservation for a room at the L'Enfant Plaza because it was fully booked. Borders said that he could arrange to get a room for the judge.[55]

The following morning the judge flew to Washington. Borders met him at the airport. The two men checked into the L'Enfant Plaza, greeted Pride, his wife, Shirley, and their new son, Elliot, in their room. The judge wanted to have a bag repaired, and Borders agreed to take him to a luggage shop. The judge accompanied Borders while he ran errands. Borders stopped by his office, returned some calls, and told the judge that he had to go out on business. The judge left Borders's office, walked to a shopping area, visited some shops, and purchased a small bag. He returned to the hotel before 1:00 p.m.; called his chambers and told a clerk where he could be reached; and ordered a light lunch from room service. Pride joined the judge while he was eating. Around 2:00 p.m., the two went to a lounge in the lobby and had drinks. They then returned to their respective rooms to rest for the evening's festivities.[56]

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[53] Comp. St. II, ¶¶ 74, 80, 82.

[54] Comp. St. II, ¶¶ 49; Resp. Ex. 85, 3B at 2646-48; Resp. Ex. 97, 3B at 2672.

[55] Comp. St. II, ¶ 82.

Shortly after his return, the judge received a call from Pride, asking the judge to come to Pride's room. A few minutes later, Pride told the judge that the FBI had arrested William Borders, and that the allegations had something to do with bribery in the judge's courtroom. The judge was stunned. Pride advised him to return to Florida so he could defend himself on his home turf. The judge lived in Ft. Lauderdale, Florida, with his mother, who was crippled by arthritis. He knew that any accusations involving his name would generate immediate and intensive media interest. He decided home was where he belonged.[57]

As the judge recalled the events, he went back to his room and made two calls -- one to his mother and one to Patricia Williams, a close friend and lawyer -- before Pride joined him in his room. After the judge had gathered his belongings, the two men went to the lobby. The judge gave Pride $100 and asked him to pay for any incidentals, to pick up the judge's suit from the valet service, and to ask one of the South

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[56] Comp. St. II, ¶¶ 85, 86, 87, 94.
[57] Comp. St. II, ¶¶ 94, 98.

Florida guests to bring it to the judge.[58]

The judge took a taxi to BWI, where he thought he could catch the earliest direct flight to Ft. Lauderdale.. As it turned out, there was no direct flight until 6:30 p.m. The judge took that flight to Ft. Lauderdale, arriving around 8:30 p.m. After checking on his mother, he went to the home of Patricia Williams. There he met with FBI agents and responded freely to all their questions for more than two hours.[59]

The judge's account of the events that took place prior to the afternoon of October 9 is thoroughly plausible and wholly consistent with the available evidence. The events that occurred on the afternoon and evening of October 9 were themselves abnormal. The immediate past-president of the NBA, a prominent advisor on minority affairs to the Carter administration and an active participant in the Democratic National Committee, a lawyer who had successfully sued President Reagan over a job and won, and a long-time friend of the judge had been arrested by the FBI. The judge, a prominent figure in the civil rights movement and in the Democratic Party in Florida and a liberal, black, activist federal judge responsible for two cases of national importance, was told the FBI's accusations had something to do with bribery in his courtroom. Viewed in context and from the perspective of someone with the judge's experience and background, the judge's response to the disclosure and his explanation of his actions were more than reasonable.

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[58] Comp. St. II, ¶¶ 96, 99.
[59] Comp. St. II, ¶¶ 100, 102, 103.

C. "Operation Apple Eye" and the Questions It Raised.

The foregoing is a summary of the plausible and substantially corroborated account of the events given by a man who had earned a reputation for integrity and honesty that was unquestioned and, in the view of many, unquestionable. The account has been twice challenged because three parties -- William Dredge, William Borders, and the two FBI agents and the prosecutor representing the government -- had a common objective. Each wanted to create a scenario that would satisfy the others that Borders in fact had the authority to solicit bribes on the judge's behalf -- Dredge, so that he could maximize the benefits of his plea bargain; Borders, so that he could realize an unearned $150,000; and the FBI agents and lawyer so that they could make a case against a federal judge. That is the only conclusion that can fairly be drawn from the evidence concerning "Operation Apple Eye" and its implementation.

On July 20, 1981, William Dredge went to the office of the United States Attorney in Miami. Dredge was a career criminal operating as a fence, a burglar, and a drug dealer. On April 29, a federal grand jury in Baltimore had indicted him on drug conspiracy and distribution charges. He wanted to make a deal.[60]

Over the next few days, Dredge told government attorneys that Borders was soliciting bribes to fix cases before Judge Hastings and another federal judge in New Orleans. The FBI had information that Borders had made similar claims concerning judges in Washington, and they were able to observe Borders talking with one of the persons from whom Dredge said Borders was seeking a bribe, Santo Trafficante, a defendant in a case before Judge Hastings.[61]

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[60] Comp. St. I, ¶ 34; II, ¶ 41.

The FBI had no information to suggest that Judge Hastings, or any of the other judges about whom Borders was reported to have made claims, was a likely candidate for such a scheme. Even Dredge later acknowledged that he had heard other lawyers make claims about other judges over the years and that he always concluded that such claims had been false. That was not his story then. When it was a deal he sought, Dredge claimed that he had known Borders for years and implied that he had overheard conversations in which Borders and the judge had discussed bribery schemes -- both assertions that Dredge has since testified were false.[62]

According to Dredge, the *Romano* case was one of the cases in which Borders had been seeking a bribe. Dredge reported that Borders was seeking $150,000 from the Romanos for assurances that they would not go to prison and had offered to have the judge appear at a particular restaurant on a specified date to demonstrate that the judge was part of Borders's scheme. Dredge claimed that he could introduce an undercover agent posing as one of the Romanos to Borders to enable the government to gather evidence of the scheme and that he would do so for a deal in his drug case.[63]

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[61] Comp. St. I, ¶ 37; II, ¶¶ 42, 43.
[62] Comp. St. I, ¶ 37; II, ¶ 42; Resp. Ex. 2, 3B at 2021-26.

The FBI assigned Special Agents Anthony Amoroso and William Murphy responsibility for the investigation. The Justice Department assigned Reid Weingarten, an attorney in the Public Integrity Section of its Criminal Division, to advise in the investigation and handle any prosecutions that resulted. Agents Amoroso and Murphy promptly designed an undercover operation to develop evidence against the judge, as well as Borders, a proposal Weingarten fully endorsed. The Assistant United States Attorney in Baltimore was persuaded to accept a deal that satisfied Dredge, and Operation Apple Eye was implemented.[64]

On September 10, 1981, Dredge called Borders and told him the Romanos were ready to deal. On Saturday, September 12, Dredge introduced a retired FBI agent, H. Paul Rico, posing as Frank Romano, to Borders. Borders confirmed the price Dredge had quoted, $150,000, for the judge's eliminating the prison terms, and agreed to two shows of proof -- the judge would appear at the Fontainebleau Hotel for dinner at 8:00 p.m. the following Wednesday, September 16, and would issue an order within ten days returning a substantial amount of the property he had adjudicated forfeit. Rico/Romano agreed in turn to meet with Borders the following Saturday and give him an unspecified downpayment.[65]

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[63] Comp. St. I, ¶ 37; II ¶ 42; Resp. Ex. 2,
[64] Comp. St. II, ¶¶ 46, 47, 55;
[65] Comp. St. II ¶¶ 57, 59, 60.

A mere dinner at the Fontainebleu was all the FBI sought as a demonstration that a federal judge was in fact involved in a corrupt lawyer's scam. Rico/Romano did not even ask Borders to have the judge take any specific action that might indicate his involvement more clearly and reduced the likelihood that Borders was just running a scam. Rico/Romano did not, for example, give Borders a tie that the judge should wear. He did not specify that the judge should wear a red carnation or carry a copy of the latest best seller. He did not even indicate what the judge should order to drink or eat. For Rico/Romano a mere dinner at the Fontainebleu was enough. As it turned out, that was all they got.[66]

The first two stages of the operation went as planned. The judge was observed having dinner with a friend at the Fontainebleau on September 16, and Rico/Romano met with Borders on September 19 and gave him $25,000. At that point, Borders assured Rico/Romano that the forfeiture order would issue within ten days of that date, by September 29, and insisted that the balance be paid promptly thereafter. On that basis, the two men agreed to meet a third time at Miami International Airport on Saturday, October 3, for the final payoff.[67]

The Director of the FBI conditioned his approval of the remainder of the operation upon Borders being arrested at the scene of the payoff. Even the prosecutor had recognized that the two "shows of proof" specified -- dinner at the

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[66] House Exs. 38A, 38B, 3A at 307-18.
[67] Comp. St. II, ¶¶ 65-67.

Fontainebleu and issuance of the order by September 29 -- would not provide the kind of evidence that should be required before initiating a case against a federal judge. The decision to arrest Borders at the scene appears to have reflected the Director's judgment that the evidence of the judge's involvement was so slight that the risk of an additional $125,000 was not merited. That decision was made before September 23 and was premised on the assumption that the judge would issue the order by the end of September.[68]

The FBI planned the remainder of the operation on that basis. Authorization to tap Borders's telephones was to be sought promptly after the judge issued the promised order. Rico/Romano would then call Borders with questions about the order to provoke discussions between Borders and the judge that could be intercepted and recorded. Borders would then be arrested at the scene, confronted with the evidence against him, and offered an opportunity to cooperate against the judge.[69]

At that point the operation fell apart. Judge Hastings did not issue the order by September 29. Authorization to intercept Borders's calls at his home and office was obtained, and Rico/Romano called Borders to find out what was happening on Friday, October 2, and again on Sunday, October 4. No calls between Borders and the judge were detected or intercepted over the weekend. On Monday, October 5 at 4:22 p.m., Rico/Romano called Borders to inquire again. In that conversation, Borders assured him that the matter had "been taken care of" and that "your [Rico/Romano's] friend should tell you something." The first evidence of any communication between Borders and the judge did not come until fifty minutes later, when the FBI intercepted the judge's call concerning "letters for Hemp" at 5:12 p.m. that evening.[70]

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[68] Comp. St. II, ¶ 69; Resp. Ex. 23, 3B at 2409-11; *see also* 1 at 595-97 (describing history of decision to arrest Borders at scene of payoff in greater detail); App. D (materials submitted to Impeachment Trial Committee in appendix to document describing history of decision to arrest at scene).

[69] *Id.*

The FBI decided to proceed with its arrest scenario, notwithstanding its failure to gather further evidence that might have exonerated the judge or shown his guilt. Rico/Romano called Borders. He agreed to fly to Washington for the final payoff and to call Borders when he arrived. The FBI prepared a room at the Twin Bridges Marriott so that the payoff and arrest could be videotaped and recorded. Over the vigorous objection of the United States Attorney for the Southern District of Florida and the chief of his criminal division, the Justice Department concurred the FBI's previously made decision to arrest Borders at the scene of the payoff rather than letting him take the money to see if any would go to the judge. No one can ever justify that decision. Given the judge's position and the stakes, it was, at best, irresponsible. It unfairly assured that Judge Hastings would be left with a burden of suspicion and doubt that no man could ever dispel.[71]

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[70] Comp. St. II, ¶¶ 72, 73.

[71] Comp. St. II, ¶¶ 83, 84.

The FBI selected October 9, the day of the Borders dinner-cruise, as the date on which the payoff would be made. Rico/Romano came to Washington and called Borders. Borders went to the hotel. He was arrested at the scene. He was advised of his rights and signed a waiver. He was confronted with evidence and efforts were made to obtain his cooperation for almost an hour. The FBI elected not to videotape or record this session, and the recollections of the agents who were there and testified about what transpired can best be described as scant. All that is known is that Borders ultimately decided not to cooperate.[72]

Any mature and proper exercise of executive discretion would have dictated that the case against the judge be terminated at that point. Given his office, senior officials at the Justice Department and the FBI should have taken command and prohibited the release of any information to the public. Upon review, they should have assumed responsibility for the failure of the investigative plan and directed that Borders alone be prosecuted. They might properly have asked Judge Hastings to assist, but there should have been no attempt to manufacture a case against a federal judge on the basis of an operation that had been terminated in a manner that prevented the judge from conclusively establishing his innocence, or the government, his guilt. Any suspicions and ambitions of the field agents and trial attorney involved should have been overridden.

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[72] Comp. St. II, ¶¶ 83, 88, 89, 90; Resp. Ex. 22, 3B at 2407.

The events that followed Borders's arrest precluded such review. There was an immediate, massive, and improper leak. The name, and eventually the picture of Dredge, the confidential informant, appeared in the newspapers. Details of the investigation and the allegations against Judge Hastings were widely disseminated. These events gave legitimate ground for the concerns that Judge Hastings and his supporters expressed; as a practical matter that disclosure reflected or forced an immediate decision to vigorously pursue the judge without regard for the consequences.[73]

These events cannot be justified or fairly defended. If the judge was a target, the decision to arrest Borders at the scene was irresponsible. That has been the considered opinion of every experienced prosecutor who has considered the question and expressed his opinion. Whether the judge was a target or not, the leak of confidential information implicating him after the arrest was just as irresponsible. It assured great suspicion would be cast and it forced a prosecution that should have been avoided.[74]

These events represent, at a minimum, lapses in judgment by Justice Department and FBI officials of a kind that cannot be tolerated when the subject is the integrity of a federal judge. The framers recognized the vulnerability of federal judges. The guaranty of secure tenure evidenced, if nothing else, an intent to protect judges from the threat of irresponsible executive action. It is for the Senate in this case to decide the weight these irresponsible acts must be accorded in reaching a decision that adequately respects the conditions necessary to maintain judicial independence.

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[73] Hastings, 2B at 2290-91; Resp. Ex. 112, 3B at 2846-61.

[74] Sonnet, 2A at 209; Raskin, 2B at 1893-95, 1896098; *see also, Impeachment Inquiry (Hastings)*, Ser. No. 11, 100th Cong., 2d Sess., App. III at 372-75 (proffer to same effect submitted to House Subcommittee).

D. Indictment to Trial: Further Circumstances That Bear Upon the Case.

Some account of the events that occurred over the succeeding eighteen months is necessary. The House has construed these events as providing support for its accusations. In respondent's view, the events raise further questions about the conduct of the government. In any event the data that was gathered and available at trial, the data that was gathered but withheld, and the data that was not gathered then or at all bear upon issues the Senate must consider in this case.

The case against Borders was solid from the outset. The case against Judge Hastings was, remained, and remains circumstantial. The question was and remains whether Borders was acting on his own or there was a conspiracy involving the judge. The post-arrest investigations focused upon gathering additional evidence to build a case for the government.

The basic data was simply gathered. On October 9, 1981, with a grand jury subpoena in hand and while the judge and his secretary were absent, FBI agents helped themselves to calendars, diaries, and other records from Judge Hastings's office and elsewhere in his chambers.[75] Those records and the information that the judge freely supplied that evening made it a simple matter for the prosecutor and the FBI to gather and reconstruct the record of telephone calls and travels showing actual or potential contacts between the judge and Borders. From Pride, they would have learned that he had apparently been unaware of any proposals by Borders to solicit help for him and that, had he known, he would not have approved them. They also would have learned that Pride's recollection of the events of the afternoon of October 9 differed from the judge's in details that were later viewed as significant.[76]

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[75] Carter, 2B at 1771-73; Simmons, 2A at 764-67.

The indictment was filed on December 29, 1981. Discovery orders were entered, pre-trial motions were filed, and a first exchange of discovery was made during January and February. One of Judge Hastings's pre-trial motions asked the court to rule that the Constitution required that impeachment by the House and trial and conviction by the Senate *precede* any exercise of discretion by the executive or jurisdiction by the courts to prosecute a sitting federal judge and to dismiss the indictment on that ground. The then-Chief Justice had designated the Honorable Edward Thaxter Gignoux of the District of Maine to preside. On February 17, 1982, Judge Gignoux denied the motion to dismiss, but announced that he would stay the proceedings if Judge Hastings appealed that order. The appeal was filed; the case against Borders was severed; and proceedings in the case against Judge Hastings were stayed pending disposition of the appeal.[77]

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[76] So anxious was Pride to curry favor that he agreed to secretly record a telephone conversation with the judge. From that they only learned that the judge was outraged by the manner in which the government was conducting the investigation and that the judge was still more concerned about his friend's problems than his own. House Ex. 128, 3A at 520-32; Resp. Ex. 166, 3B at 3469.

Borders was tried in March 1982. Before the trial, Judge Hastings had offered the draft letters he had discussed with Borders in the October 5th telephone conversation to John Shorter, Borders's lawyer. The judge also made himself available to testify at that trial, if called. Shorter declined the offer. The judge was not called. Borders limited his defense to a parade of character witnesses, mostly former officials in the Carter campaign or administration.[78]

The character evidence was impressive and clear. Borders had maintained a reputation for honesty and integrity of the highest order among persons in prominent positions who knew and had worked closely with him. The evidence for this point is clear, unequivocal, and convincing: Borders had effectively concealed his criminal associations and rainmaking activities from all his non-criminal friends and associates. The evidence of Borders's corrupt involvement shown by his dealings with Rico/Romano was, however, undisputable, and the circumstantial evidence indicating the judge's participation went to the jury unrebutted and unexplained. The jury had little choice but to find Borders guilty, and it did.[79]

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[77] House Ex. 148, 3A at 706; Resp. Ex. 157, 3B at 2992, *id.* at 3000, 3005, 3008, 3151, 3159-60.

[78] Comp. St. I ¶ 25; Duncan, 2B at 1847; Selig, 2B at 1848-50; PT: Reid, 2B at 1914-26; PT: Brown, 2B at 1905-12.

[79] *Supra*, note 77; PT: Cunningham, 2B at 1927-34; Stip. No. 215, 1 at 935; Rep. at 26, *id.* at 40.

After the court of appeals rejected Judge Hastings's appeal, Judge Gignoux scheduled a status conference for November 4, 1982. He scheduled the trial for January 10, 1983, and thereafter directed that pre-trial discovery be completed by December 1, 1982. The materials produced on that date included the draft letters the judge had written on October 5. The government had those drafts tested and learned that both the paper and the ink had been in use prior to October 1981.[80]

Throughout, the prosecutors withheld or resisted producing at trial information that bore directly on the judge's defense. The judge had sought in vain to locate Dredge and had asked the court to direct the government to produce him for interview, for deposition, and as a material witness at trial. The prosecutors resisted these attempts, claiming that his materiality was not established. The judge also sought, however, to introduce evidence showing that too frequently unscrupulous lawyers or others, "rainmakers" as he styled them, made unfounded claims that they had the power to fix cases before a judge in exchange for a bribe. The prosecutors objected, and Judge Gignoux ruled that such evidence would not be admitted unless Judge Hastings could produce evidence that Borders had held himself out as having the power to fix cases before judges other than Judge Hastings. The prosecutors never disclosed that Dredge was the witness Judge Hastings needed.[81]

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[80] Resp. Ex. 165; 3B at 3373-75; House Ex. 145, 3A at 693. House Ex. 157, 3B at 3119-22, 3130-31; PT: Stallworth, 3B at 3471-77; Hastings, 2B at 2307.

[81] House Ex. 157, 3B at 3119-22, 3130-31; PT: Stallworth, 3B

The trial took more than two weeks. The prosecutors had elected to proceed on the theory that the conspiracy began on or about September 10 and ended with Borders's arrest on October 9. They selected and presented their evidence accordingly. The judge presented his witnesses and evidence. He took the stand and testified fully. He was examined and cross-examined over a two-day period. The government produced witnesses and documents in rebuttal to undermine the judge's credibility.[82]

Reid Weingarten marshalled the evidence for the government in closing. Event-by-event, inference-by-inference, statement-by-statement, he argued that the circumstances, individually or collectively, "overwhelmingly" established that the judge was a guilty participant and that his explanations to the contrary were false. Patricia Williams marshalled the evidence for the accused. Inconsistency-by-inconsistency, explanation-by-explanation, she argued that this was a man of honesty and integrity who had been manipulated and deceived by a friend and prosecuted by a government that valued its cash more than truth. In rebuttal, Weingarten argued explicitly that the judge's testimony on

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at 3471-77; Hastings, 2B at 2307. The prosecutors also submitted the transcript of the conversation between Pride and the judge which Pride had covertly recorded. Pride was one of the government's main witnesses, but the prosecutors suggested that the judge was not entitled to have the recorded conversation to prepare for cross-examination. Judge Gignoux apparently agreed. Judge Hastings did not even learn the conversation had been recorded until shortly before the hearings before the Impeachment Trial Committee.

[82] Blocker, 2A at 835.

every material point was false and that the letters were fabricated. He argued that this alone was conclusive evidence of guilt: "Why," he cried, "would a federal judge tell untruths in his own trial, unless he was guilty?"[83]

The jury, the only body that has previously heard the evidence and arguments on both sides, deliberated and returned its verdict -- not guilty, so say we all. One of the jurors later summed up the case in a sentence that is as true today as it was then. The government had "a circumstantial case that was shaky at best . . . and an investigation that didn't finish."[84] Six years later, the case against the accused remains the same in every material respect. It is the case for the accused that has been strengthened.

E. Borders Learned About the Romanos and Their Case Through Nesline and Dredge.

There has always been one troubling question that the judge's explanations could not fully address because he did not know the answer: "How did Borders learn about the Romanos and obtain information about their case?" At the trial, the judge could only point to the ease with which information could be obtained from the courthouse and his chambers and the notoriety and interest the *Romano* case had generated locally and, among criminal defense lawyers, nationally. He could not respond further. In the course of the subsequent investigations, the government disclosed the information from which the answer might have been discovered. The necessary inquiries were not pursued, and now it is too late. It is still possible, however, to reconstruct plausible theories that corroborate the judge's innocence. One such theory merits emphasis here.

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[83] Resp. Ex. 165, 3B at 3276-77, 3280-81, 3282-83, 3284-86, 3292-93, 3295-97, 3300-04, 3305-09, 3312-19; *id.* at 3332-3441 *passim*; *id.* at 3448-51, 3456-58, 3459-60, 3461-63; Resp. Ex. 165, 3B at 3320.

[84] S. Hrg. 101-3 at 40 (Jan. 26, 1989) (transcript of remarks by Deborah McMullen from video tape played for Senate Committee on Rules and Administration).

By all accounts, Joseph Nesline was a major underworld figure in Washington, D.C., with connections to organized crime in Florida and elsewhere. According to the FBI, he had significant connections in the Genovese organized-crime family. Nesline knew Borders and undoubtedly became involved in his corrupt schemes. Apparently, Nesline believed Borders's claims that he could fix cases before Judge Hastings and other judges. According to Dredge, Nesline introduced Trafficante and Dredge to Borders.[85]

By all accounts, Nesline would have had sources through which he could have gained easy access to information about the Romanos and their case -- either directly or indirectly. Dredge, in all probability, was brought into the relationship after Nesline suggested that Borders might be able to help Dredge with the problem created by his indictment. It is also clear that Dredge had the ability to obtain accurate information concerning criminal figures in South Florida and their activities. But Nesline had not seen Dredge in years, and Borders had never met him before Nesline introduced the two men. In all likelihood, Nesline learned that the Romanos had a case before Judge Hastings, informed Borders that they were potential customers, and established the initial lines of communication through which he could be kept informed of developments in their case.86

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[85] Comp. St. I, ¶ 28.

On any fair assessment of the evidence, Dredge did not meet Borders until late April or early May 1981, as he testified before the judicial investigating committee. There is no evidence of communication between Dredge and Borders in the available records prior to May 5, 1981. Indeed, the first indicated contact between Nesline and Borders did not occur until April 9. After May 5, regular communication between Borders and Dredge is reflected in the available telephone records. Prior to May, Dredge flew into Baltimore-Washington International Airport. After May, he flew to Washington National Airport. Dredge's original testimony that he probably first met Borders between the date of his indictment, April 29, and the date of his arrest May 5, is indirectly corroborated by other testimony.[87]

It is also clear that from the outset of their relation, Dredge was seeking a way to "fix" his drug case in Baltimore so that he could avoid prison. Dredge admitted as much. Moreover, on May 14, 1981, Dredge made his first attempt. Nesline introduced Dredge to Kenneth Robinson, an experienced criminal defense lawyer in Washington. Dredge offered Robinson $100,000 to "guarantee" the case. As Robinson understood

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86. Comp. St. I, ¶¶ 28, 35, 36.
87. Comp. St. I, ¶¶ 32, 37; House Ex. 12, 3A at 197; *id*. 17, 3A at 225.

Dredge's offer, Dredge wanted him to pay-off a judge, the prosecutor, the cops, a juror, someone in the clerk's office, anyone who could guarantee the outcome. Robinson refused to become involved in such a scheme.[88]

Dredge's unrehearsed account to the judicial investigating committee was consistent on several points. He claimed that Borders did not tell him what Borders proposed to do for the Romanos until their third or fourth meeting or conversation. According to Dredge, only then did Borders say he was offering the kind of assistance that all "rainmakers" offer -- to "fix" the case. Dredge claimed he thought from the outset that Borders was just a "rainmaker," a lawyer "blowing smoke" and, in fact, had no influence over Judge Hastings or any other judge.[89]

Dredge claimed that there was one and only one event that caused him to change his view. According to Dredge, on the day before a date on which the Romanos were scheduled to be sentenced, Borders told Dredge that the judge would *sua sponte* and without request from anyone grant the Romanos a continuance as a show of Borders's authority and to give the Romanos more time to agree to come up with the money. According to Dredge, the day after the event, Borders claimed the judge had granted a *sua sponte* continuance.[90]

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[88] The reasons why Robinson recalled the conversation so clearly eight years after the fact bears directly on the issues in this case. *See* Robinson, 2B at 1834-45.

[89] Resp. Ex. 2, 3B at 2020-23, 2025-26; Dep. W. Dredge, 3B at 2214-15.

[90] Dredge, 3B at 2028-29, 2033.

By Dredge's own account, at least four conversations or meetings spanning a period of two months intervened between the first meeting with Borders and Borders's promise that the judge would grant a *sua sponte* continuance. On that basis, if the statement was made at all, the only date on which Borders could have told Dredge that the judge was going to grant a *sua sponte* continuance was on July 7, 1981. The judge did not grant a continuance; he sent the Romanos to jail. This Dredge would have promptly discovered. That event alone, if it occurred, would have confirmed what Dredge apparently believed from the outset -- that Borders did not even have the power to "fix" a continuance in Judge Hastings's courtroom.[91]

By his own account, Dredge remained in contact with Borders in order to maintain Borders's belief that the Romanos still were interested in a deal so that Dredge in turn could use this information to cut a deal in his case with the government. In this view, either he or Borders would have continued to use the channels of communication established by Nesline or Dredge to keep themselves informed about developments in the case. Direct or indirect inquiries to the Romanos or their associates would surely have revealed the opinion of their lawyer, Mr. Sonnett that the judge was likely to vacate a substantial part of the forfeiture after he read the new court of appeals decision. The fact that Miller's term as clerk expired in September could have been easily discovered.[92]

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[91] Comp. St. II, B. ¶ 33; II B. ¶ 35, ¶ 37.

[92] Resp. Ex. 2, 3B at 2026, 2140; Comp. St. II.B. ¶ 38;

After July 20, Dredge, had an additional source -- the FBI. The evidence here is troubling. The FBI contacted James Deichert, the prosecutor in Romano, told him about the case, and asked him to report on any information he obtained from Jeffrey Miller, the judge's clerk. Deichert called Miller in August and learned that Miller was preparing an order that might merit publication. Notwithstanding his after-the-fact account, Deichert has testified that in his view *Martino* compelled the judge to return a substantial amount of the property. Deichert must have known that the fact that the judge had not issued a "brief order" shortly after the July 8 hearing and the fact that Miller was preparing an order so substantial it might merit publication meant the issue was being revisited and that it was possible, perhaps probable, that the portion of the Romano judgment adjudicating the $846,000 cash forfeit would be vacated. After the court issued its decision in *Peacock* on August 27, he must have known such a decision by the judge was probable, if not certain, notwithstanding any views the judge expressed on July 8. Deichert would have also known that Miller was scheduled to finish his clerkship by the end of September. Deichert would have reported these developments to Agent Murphy, and it is certainly plausible, and perhaps probable that Dredge was briefed or that this information was discussed in his presence.[93]

Hastings, 2B at 2274; Miller, 2A at 625.

[93] Deichert, 2A at 53, 52; Miller, *id.* at 633-34, 661, 662, 663, 647, 608.

By his own account, Dredge was an excellent "con-artist," well able to tell his customers what they wanted to hear in order to make a deal, and no one who has studied the record or seen the man can doubt that he is a practiced liar. By his own account, he was stringing Borders along so that he could make the best deal possible for himself with the government. The deal he initially made was good, but its full value depended in significant measure upon how Agent Murphy and his cohorts viewed the value of Dredge's cooperation in Operation Apple Eye.[94]

There is distressing evidence of Dredge's on-going and covert role during that operation in the records that remain. The evidence is as fragmented and fragmentary as that upon which the House relies, but the data that remain can be marshalled to support an account as plausible as that concocted by the House and an account that should have been considered and investigated far earlier.[95]

The telephone records contain evidence that Dredge made calls to Borders in the days preceding September 10. Moreover, by that time, Dredge and Borders had established a system of pay phone contacts through which they could communicate without risk of detection. It seems likely that the contacts shown in the available records are no more than the tip of the iceberg. Dredge acknowledged that he used conversations such as these to persuade Borders that a deal with the Romanos was just around the corner. It is almost certain that he and Borders would have "negotiated" the details of a deal that would be "acceptable" to the Romanos and that Dredge would have shared such information as he had gathered or been supplied about the Romanos and the case if only to satisfy Borders that Dredge was indeed dealing with the Romanos.[96]

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[94] Dredge, 2A at 160, 161, 162, 163, House Ex. 23, 3A at 237-38.

[95] Resp. Ex. 3, 3B at 2153-54.

It seems certain that Dredge was in fact acting as a "broker" throughout -- a broker for two "undisclosed principals," the FBI and himself. It is certainly plausible and perhaps probable that Dredge used the information available to construct and broker a deal that would satisfy both sides -- Borders and the FBI. The evidence of on-going contacts through October 7 contains strong indications that he continued to keep each side supplied with the information necessary to assure the deal went smoothly.[97]

It does not take a linguist to recognize that the recorded conversation between Rico/Romano and Borders on September 12 was a conversation between two men, each of whom had been so clearly briefed on the other's position that cryptic remarks were sufficient to confirm the details of a deal that had been well-brokered in advance. The fact that Borders suggested that Dredge be used as an escrow agent confirms that Dredge had convinced Borders of his role. The fact that Borders asked and Dredge agreed that the two would meet immediately after that first meeting with Rico/Romano emphasizes the point and makes it clear that Dredge would have been fully briefed on the agreement, including Borders's promise that he would have the judge appear for dinner at the Fontainebleau on Wednesday, September 16.[98]

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[96] *Id.*, 3B at 2155-64, Dredge, 2A at 97.
[97] Resp. Ex. 3, 3B at 2167; Dredge, 2A at 95.

On Wednesday, September 16, Dredge placed a call to Caesar's Palace in Las Vegas, where Borders was attending the Leonard-Hearns fight. The most plausible purpose of this call was that Dredge and Borders needed to set a time and make arrangements for a pay phone contact so that Dredge could confirm that the judge had in fact responded to Borders's manipulative invitation and appeared as promised.[99]

There are other corroborative indications in the record, only two of which need be noted here. In their recorded conversation on September 19, Borders assured Rico/Romano that the order would be out by September 29. Among the reasons he gave for insisting that the balance of the bribe be paid promptly thereafter was the fact that "the others guys (sic) got to be having twenty." Unless other persons whose identities have not been disclosed were involved in this incompetent operation, the "other guy" can only have been Dredge.[100]

The final recorded reference corroborating Dredge's ongoing role came in the conversation between Rico/Romano that occurred at 4:22 p.m. on October 5 (fifty minutes *before* the judge's call concerning the letters he had drafted for Pride). In that call Borders assured Rico/Romano that the matter had

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[98] House Ex. 38B, 3A at 308; Dredge, 2A at 95.
[99] Rep. at 67; House Ex. 10, 3A at 166.
[100] House Ex. 43B, 3A at 325, 328.

"been taken care of" and "your friend should tell you something." In context and on the basis of the available data, the reference to "your friend" can only be construed as a reference to Dredge and as confirmation that it was Dredge from whom Borders had received his information and from whom he assumed that Rico/Romano would be receiving similar reports.[101]

That summative account is fully consistent with the data that remain. It is in some measure confirmed by the fact that Nesline later reported on two occasions -- once to Kenneth Robinson, a lawyer, and once to Kendall Shull, an undercover FBI agent -- that the judge was innocent and that Borders was simply running a scam on his friend. It can now never be further confirmed because Nesline has become incompetent and the Romanos are dead. That, however, is the fault of those who declined to pursue the investigation when that was possible. Given those failures, fairness to Judge Hastings requires, at a minimum, that any plausible account consistent with his innocence be assigned a presumption of correctness. The evidence makes it clear that this is one of several plausible hypotheses consistent with the judge's innocence that the House's evidence fails to rebut.[102]

The evidence presented by the House is not enough. Standing alone, as it did at Borders's trial and in the proceedings in the judiciary and the House, the evidence can be marshalled to establish a circumstantial case of sorts. The evidence here does not stand alone. As he did in 1983, the judge has confronted the evidence. The testimony and other evidence he provided supports an account that is thoroughly plausible and wholly consistent with his claim of innocence. What is left is, at most, mere suspicion about the judge supplemented by doubt about his accusers. That should never be enough.

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[101] House Ex. 53B, 3A at 360, 361.
[102] Robinson, 2B at 1837; Shull, 2B at 1822.

II. SOME DETAILED ANALYSES OF THE HOUSE'S ARGUMENTS CONCERNING ARTICLE I: RECONSTRUCTING REALITY TO FIT A PATTERN

The House managers now rest their case on three main points -- the "pattern" established by the "contacts" between the judge and Borders and Borders and Dredge; three alleged "shows of proof" that Borders offered; and four "examples of complicity" on the judge's part. We address each in turn.

We analyze first the evidence concerning each of the claimed "contacts" between the judge and Borders and the House's further claim that it should be viewed in juxtaposition with an event in the *Romano* case or in Operation Apple Eye. We then analyze the evidence concerning Dredge's contacts with Borders and its bearing upon two points -- the "pattern" the house has attempted to impose on the contacts between the judge and Borders and the House's claim that the continuance on May 11 should be viewed as a "show of proof." We briefly address the House's arguments concerning the other two alleged shows of proof -- the dinner at the Fontainebleau and the issuance of the *Romano* order. We conclude with an analysis of the House's four "examples of complicity."

A. The Nineteen Contacts Identified by the House

The managers identified nineteen actual or speculative contacts between the judge and Borders which they claim can be juxtaposed with events in the *Romano* case to establish a "pattern" that overwhelmingly demonstrates guilt. What they portray as a pattern as solid as a block of Vermont cheddar cheese is, upon examination, far more like an ill-formed lump of ersatz Swiss. The holes in the pattern and the evidence they urge as support for their speculative claims may be readily identified and demonstrated.

1. *February 20: The Three-Minute Call.* The House reports:

> On February 20, 1981, the day of the Romanos' forfeiture hearing, Judge Hastings called Borders early in the morning. The call lasted three minutes.[103]

The House may safely claim that the evidence shows that Judge Hastings called Borders and spoke with him for three minutes or less on February 20, 1981. The judge's long-distance telephone records reflect the call, and he recalled and confirmed it. The evidence also shows that the judge and Borders attended the NBA/Judicial Council Meeting in Miami Beach which began six days later. This evidence corroborates the judge's direct testimony concerning that conversation. The managers' claim is speculative at best: *Pre hoc; ergo propter hoc.* The other purported contacts involve speculations that are either unsupported by or in conflict with the evidence.

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[103] House Mem. at 39.

2. *April 9: A Message Slip and a Pay Phone Call.*

The House reports:

> On April 9, 1981, the day after the last memoranda relating to the forfeiture issue were filed, Judge Hastings called Borders' office. He left a message for Borders to call and said he would be "at his office between 12 and 1." At 12:15 p.m. a call was placed from a pay phone in the corridor of the third floor of the federal courthouse in Miami, (125 feet from Judge Hastings' chambers) to a pay phone in the lobby of the federal courthouse in Washington, D.C. The call lasted one minute or less and was charged to Judge Hastings' residence. . . .[104]

The message logs from Borders's office reflect that Pride tried to call Borders twice on April 9. Without the records from Pride's telephone, it is no longer possible to determine whether this was also a day on which Pride called Judge Hastings. Dr. Andrew Chisolm recalled that Borders had been asking prominent associates to establish pay-phone-to-pay-phone contact for ordinary political conversations as early as the mid-1970's. That was one of the man's eccentricities.[105]

From the evidence, the judge assumes he made the call. He does not independently recall it eight years after the fact. He does not recall (a) whether the call was made to Borders, or (b) if so, whether he reached Borders, or (c) if so, whether they devoted their one minute or less to discussing some concern that Pride had raised or some other topic. If the pay phone call was to Borders and if the two men spoke, the most plausible speculation consistent with the data is that they spoke about some concern Pride had raised.

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[104] House Mem. at 39-40. The House's report of alleged contacts between Dredge and Borders that are not documented in the available records are addressed above and below. The present section focuses upon the claimed "contacts" between the judge and Borders and their juxtaposition with events in the *Romano* case. Only those post-May 1 contacts between Borders and Dredge which are documented and corroborated are reported here. The other reported contacts are addressed elsewhere.

[105] *See also* PT: Stewart, 2B at 1962-63.

The speculative juxtaposition advanced by the House conflicts with the evidence. Judge Hastings was a busy judge on a busy court. He delegated considerable and perhaps, at that stage of his career, too much responsibility to his clerks. The evidence is clear that the judge never saw or reviewed memoranda submitted by parties to a case until the issues were ripe for decision or immediately prior to the hearing to which they were relevant. Pleadings and memoranda were routed directly to the clerk responsible for the case and were not submitted until the clerk had reviewed them and was prepared to advise the judge on how the issues should be resolved.[106]

In the normal course, Miller might have been the only person in the judge's chambers who would have been aware that the final memoranda on the forfeiture issue had been submitted on April 8. In the ordinary course, the judge would not have been aware of the memoranda for some weeks, perhaps not until shortly before May 4, the day he reviewed the matter and signed the original forfeiture orders. Any departures from this practice would likely have been noticed. The existence of this routine practice in the judge's chambers establishes to a high degree of probability that Judge Hastings had no idea that a memorandum had been filed on April 8.

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[106] Comp. St. II, ¶ 34.

The House asks the Senate to speculate against the probabilities. Speculate that the judge knew the memorandum had been filed, notwithstanding the presence of evidence to the contrary and the absence of any in support. Speculate (i) that Borders was at the courthouse in Washington and (ii) that he called the judge to set up a pay phone conversation sometime between 12 noon and 12:15 p.m., even though there is no evidence to support either prong of the speculation. Speculate further (i) that the judge was returning this call at 12:15 p.m., (ii) that the indication of a call lasting something between 1 second and 60 seconds means he and Borders talked; and (iii) that what they talked about for 60 seconds or less was the *Romano* case. Set these speculations against the direct testimony of a man who had earned a reputation for honesty and integrity of the highest order. Swiss cheese with so many holes its hard to detect the cheese -- that is what the House case is here and throughout.

3. *April 23: Three Message Slips and Another Memorable Event*. The House reports:

> Judge Hastings called Borders three times within a few days of April 23, 1981, the date the parties were advised the Romanos' sentencing was scheduled for May 11, 1981.[107]

There are three message slips that indicate that Judge Hastings called Borders's office during the week after he had mailed his April 21st proposal for an NBA/Judicial Council fund-raising dinner -- one each on April 27, 28, and 30. These message slips establish conclusively that the judge did not talk to Borders on these occasions. The House produced no evidence that Borders returned these calls. The records for Borders's (and for Pride's) phones for this period were not gathered and have since been destroyed.[108] It is the absence of these records that makes it possible for the House to invite Senators to speculate about the purpose of these calls and the existence of conversations not shown in the records. The burden of proof is on the House, however, and for that reason the invitation to speculate is improper.

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[107] House Mem. at 40.

The record is also barren of any evidence that Judge Hastings knew or would have known (i) that the sentencing had been scheduled for May 11 or (ii) that Miller had made a call on April 23 so advising the parties. Marilyn Carter was the courtroom deputy who assisted the judge in managing his court calendar, and she and the law clerks handled matters such as confirming dates with counsel for the parties. How this mundane matter was handled on April 23, 1981, is something no memory could recall eight years after the fact. The proposition advanced by the House can only be reached by speculations. These are speculative propositions of the kind which the House claims establish the solid foundation that is necessary for the further inferences it would require the Senate to accept in order to establish guilt. Speculation piled upon speculation; inference piled upon inference: This is the House's case.

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[108] Comp. St. II, ¶ 13, 14; App. B at 8-9.

4-6. May 4-11: Two Message Slips and Four Calls of a Minute or Less. The House reports:

> On May 4, 1981, the day Judge Hastings entered his order compelling the forfeiture of $1,162,016 of Romano property, he called Borders during a morning recess and left an "urgent" message that he would be awaiting Borders' call between 12:00 and 1:00 p.m.[109]
>
> Judge Hastings called Borders four times between May 5 and the scheduled time of the Romanos' sentencing on May 11, 1981: once after midnight on May 6 from Madison, New Jersey; once on May 7 at 4:30 p.m. when Judge Hastings left a message for Borders to call him at 7:00 a.m. the next morning; and twice before 7:00 a.m. on May 11. Two of the calls (on May 7 and May 11) were to the home of Borders' girlfriend.[110] On May 11, Judge Hastings postponed sentencing.

The evidence does not show any contact between the judge and Borders during this period. The two message slips (May 4 and 7) demonstrate that the judge did not speak with Borders in those calls. The very frequency of the four calls that lasted one minute or less suggest that he was, in fact, unable to reach Borders during this period. That is in some measure confirmed by the calls on May 11: The first to Borders's residence was followed a minute later by a call to the home of Borders's friend.[111]

These dates span the period when the judge's April 21st proposal was under consideration and are during the week after the weekend when it was apparently to be reviewed and discussed by the NBA leaders in Los Angeles. The managers ask Senators to juxtapose these message slips and calls with events in the *Romano* case (and events reconstructed by Dredge) and to speculate about communications not shown by these records and, based upon these speculations, to speculate further that a corrupt plot was afoot. This is no more than an attempt to arrange the fragmented and fragmentary pieces of the puzzle that remain in a way that invites unsupported speculation that once there was a dragon of corruption to be seen. "Puff the Magic Dragon" had more substance.

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[109] House Mem. at 40.
[110] House Mem. at 40.
[111] Comp. St. II, ¶ 13.

5. *May 5: Speculating in the Absence of Evidence.* The House reports:

> The next day, May 5, 1981, Borders flew to Miami, arriving at 3:58 p.m. He was scheduled to depart at 6:50 p.m. The same day, Judge Hastings was scheduled to depart Miami at 6:55 p.m. Both were departing from the Eastern Airlines terminal of the Miami airport.[112]

The judge flew to Newark, New Jersey for a speaking engagement on a flight scheduled to depart at 6:55 p.m. Borders flew to Miami that day apparently to meet Dredge. His flight arrived at 3:58 p.m. The records necessary to determine when Borders actually returned to Washington have been lost. The managers have produced through the unexamined prior testimony of an airline records specialist reporting that an undecipherable record showed that Borders had made a reservation to fly to Washington on a flight scheduled to leave Miami at 6:50 p.m. Both flights were scheduled to depart from the Eastern Airlines Terminal. The record does not reveal, however, to which gates within that large terminal each of the flights was assigned. The record does not reflect when Borders was able to complete his business with Dredge and return to the airport in time to catch a 6:50 flight. They do not reflect that he did.[113]

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[112] House Mem. at 40.

The judge has testified that he did not see or talk with Borders at the airport. The flurry of attempts by the judge to reach Borders late that night would seem to confirm that view. Even the story Dredge concocted for the Senate does not suggest why Borders and the judge would have wanted to meet on this occasion if there had been a plot afoot.

The House invites the Senators to speculate against the evidence and against the judge's direct testimony as corroborated by circumstances. In its view, Senators may safely speculate that Borders was able to travel from the airport, complete his business, and return to the airport within the less than three-hour interval between his arrival and the scheduled departure of the flight on which the reservations specialist reported that he had a ticket. Speculate further: He did so and his purpose was to meet with the judge. Speculate further: He found the judge and they talked. Accept these speculations as establishing one of the claimed contacts so that we may speculate further about the "pattern" those contacts establish and its meaning.

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[113] Comp. St. II, ¶ 26.

7. *May 31 [29]: Two More Calls of a Minute or Less.* The House reports:

> On May 31, 1981, Borders called Judge Hastings twice: at 7:53 a.m. and 8:27 a.m. The day before, William Dredge had been in Washington, D.C. The day after the calls, the Romanos' sentencing was rescheduled for July 8, 1981.[114]

Borders called the judge twice on the morning of May 29 (not 31). If they talked, it was about the President's attempt to remove Borders or about Pride's victory in the South Carolina Supreme Court.[115] The House asks here to juxtapose these calls with a non-event in the *Romano* case as a basis for further suspicion and speculation.

The judge directed Sonnett and Romano to agree upon a date for the final hearing that accommodated Deichert's plans. They did and so advised the clerk in the judge's chambers. The ministerial task of putting it on the calendar and mailing notices to counsel is not a matter likely to involve the judge or of which he would have been aware. There is no evidence that there was. Further still, had the judge involved himself in the kinds of routine details such as this (or the re-routing of memoranda such as the House assumes in its use of April 9 as a date), the departures from ordinary chambers practice would have been noted and recalled. They were not. Insofar as the record reflects, the *Romano* case and *Romano* file were handled normally throughout.[116]

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[114] House Mem. at 40-41.
[115] Comp. St. II, ¶¶ 10, 23, 24.
[116] Comp. St. II, ¶¶ 20, 27;

This assertion is a graphic illustration of the danger of after-the-fact reconstruction. Compare every contact in the telephone records with every entry in the *Romano* docket. If the call preceded or followed the date of the entry, assume the two are related. Speculate about the relation. Juxtapose the events in a manner that suggests the speculation. Claim the speculation has been "overwhelmingly" proved. Use it as established fact in argument. Claim that the established facts can be marshalled to show a "pattern" as a proven fact. Argue that the proven pattern "overwhelmingly" establishes guilt. This is how stories can be concocted based upon fragmentary data. This is procedure for novel-writing, not impeachment trials.

8-10. *July 5 - September 10: On Juxtaposing Events*. The House reports:

> Judge Hastings sentenced the Romanos on July 8, 1981. On July 5, 7 and 9, Judge Hastings called Borders. The July 5 and 7 calls each lasted less than one minute. On July 9, Judge Hastings left a message for Borders. Between July 7 and 9, Dredge was in Washington, D.C. and overheard conversations about a bribery deal involving Santo Trafficante. The following weekend Borders met Judge Hastings in Miami.
>
> During late August and early September, 1981, William Dredge told Borders that the Romanos might be interested in a deal. On August 31, 1981, at 5:42 p.m., Dredge called Borders. On September 1, 1981, at 11:36 a.m., Borders called Judge Hastings.
>
> On September 10, 1981, the same day that Dredge and Borders arranged the first meeting with "Frank Romano," there was a series of calls between Borders and Judge Hastings. The calls occurred both before and after Dredge and Borders arranged the meeting.[117]

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[117] House Mem. at 41.

The calls and meetings between Borders and the judge that occurred and the obvious explanations are to be found in the ABA Standing Committee meetings in Washington, the NBA annual meeting in Detroit, and Pride's attempt to apologize to the South Carolina Chief Justice are independently established as beyond dispute. Each of these events and their related activities would have justified and probably required communication between the judge and Borders. The telephone calls and meetings that did occur are consistent with the pattern of calls and events that would have been expected. Indeed, the absence of contacts in this period might provide better grounds for suspicion.[118] The attempt to juxtapose the calls and meetings with the calls and meetings between Borders and Dredge is outrageous.

By his own account, Dredge was stringing Borders along, reporting that he was in regular contact with the Romanos and pushing them toward agreeing to a deal.[119] The attempt to juxtapose a corrupt Dredge's activities and communications with a corrupt Borders and to juxtapose them with normal and expected contacts between Borders and the judge in order to incite suspicion is improper. At best, the juxtaposition invites speculation that is uncorroborated. It is speculation that conflicts with the judge's direct testimony, which is corroborated. At worst, it is simply an attempt to prove guilt by association.

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[118] Comp. St. II, ¶¶ 31, 39, 40, 44, 52, 53, 56.
[119] Comp. St. II, ¶¶ 45, 47, 55.

In the House's view the facts that Judge Hastings associated with Borders and that Borders was guilty is enough to establish the judge was guilty. That is the argument that underlies much of the House's case. It is through fallacious assumptions such as those that they seek to shift the burden of proof to the judge. That is not proper.

11-12. *September 11 and 12: Logical Inconsistencies.* The House reports:

> On September 11, 1981, the day before Borders was to meet Rico for the first time, Judge Hastings called Borders twice to tell him his flight was delayed. There was an hour and 15 minute period during which Judge Hastings and Borders could have met at National because Borders had delayed his flight to Miami.
>
> On September 12, 1981, after meeting for the first time with Rico and setting up the bribery deal, Borders went to great lengths to return to Washington, D.C. and arrived at Judge Hastings' Sheraton Hotel room sometime after 10:00 p.m.[120]

The meeting on September 11 did not occur, and the House's repeated claims that it did conflict with the evidence and with logic and common sense. The evidence:

> *First*, the judge testified that he did not meet Borders at the airport and did not know Borders's flight plans. He accounted for the time it took him to get to the hotel. The account was corroborated in significant measure by Shirley Ross, his date that evening.[121]
>
> *Second*, the FBI observed Borders at the airport and saw him board his plane. They did not observe a meeting.[122]

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[120] House Mem. at 41.
[121] Comp. St. II, ¶ 56.
[122] Comp. St. II, ¶ 58.

Third, Borders was a practiced user of pay phones and employed them regularly for innocent as well as suspicious contacts. He knew how to arrange pay phone to pay phone communications.[123]

Fourth, Borders had planned to spend the weekend at a large family reunion. His prominence was such that his presence or absence would be noticed and a premature departure recalled.[124]

Fifth, Judge Hastings had observed Tom and Frank Romano closely and knew their backgrounds well. There were pictures of both in the file in his chambers. He had reason to believe they were in California. He could have described Romano and briefed Borders well if the two had met before Borders and Rico/Romano met on September 12.[125]

Sixth, the judge planned a party with McCrary in their hotel suite for the evening of September 12. McCrary and four strangers assembled with the judge. This is not the conduct of a conspirator who expects to have a covert meeting to receive a progress report from his co-conspirator.[126]

Seventh, in his meeting with Rico/Romano on September 12, Borders made no inquiries about matters that the judge would have known. He gave no indication that he had any information about the Romanos beyond what Dredge could have supplied.[127]

The logic and common sense:

First, if Borders and the judge had met on September 11th, there would have been no reason for Borders's sudden departure from the family reunion. He would have gone to a 7-11 store or a filling station and called the judge from a pay phone: A simple, "The Fontainebleau, main dining room, be there at 8:00 p.m.," would have sufficed.

Second, if Borders and the judge had met and if Borders had promised to return the following evening, the two men would have agreed to meet privately. The judge would not have arranged or participated in a party with a friend and three strangers at the time and place where he expected Borders to arrive.

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[123] Comp. St. I ¶ 26, a point confirmed by Dredge.
[124] Comp. St. II, ¶¶ 54, 61.
[125] E.g., House Ex. 156,,, 3A at 1231.
[126] Comp. St. II, ¶ 62.
[127] Comp. St. II, ¶ 60; House Ex. 38A, 38B, 3A at 307-318.

> *Third,* if the judge had been a participant and if Borders had reported Dredge's call on September 10, the judge would have brought pictures of Tom and Frank Romano to show to Borders. If he had not brought the picture to Washington, he would have described them in sufficient detail to provoke inquiries by Borders and would have examined Borders in some detail on these points thereafter.
>
> *Fourth,* if the judge had been a participant in Borders's corrupt scheme and if he had met with Borders on September 11 and if Borders had returned on September 12 to discuss his meeting with Rico/Romano, the conspiracy would have promptly ended and there would have been no dinner at the Fontainebleau.

The conclusion:

> *First,* the judge did not meet with Borders at the airport on September 11.
>
> *Second,* the judge did not expect Borders and was surprised when he appeared at the Sheraton on September 12.
>
> *Third,* the judge was not a participant in and was unaware of Borders's corrupt scheme.

Those are the conclusions compelled by analysis of the events that occurred on September 11 and 12. These are the kinds of "key" propositions upon which the House relies as supporting its claim that the "evidence" provides "overwhelming" evidence to the contrary. The evidence is overwhelming in volume, but at this late stage it can as easily be marshalled to provide "overwhelming," at least in the sense the house uses that word, evidence of innocence.

13. *September 20 or 21: The Judge's Report of a Telephone Call.* The House reports:

> On September 20 or 21, 1981, Borders called Judge Hastings, one or two days after the up front payment on the bribe of $25,000 was paid to Borders by Rico on September 19th.[128]

It was the judge who recalled this conversation, and he said he asked about Borders's failure to appear and they talked about Pride.[129]

The obvious question is why would the judge have identified a call that was not reflected in the records and fixed the date of that call as being two days after the payoff, if he had been a participant or if he was willing to give false testimony. Had the judge lied and said there was a call from Borders on September 18, it would have explained how Borders knew the judge had gone to the Fontainebleau and eliminated one of the managers' arguments. Of course, if the judge had testified to a call on September 18, the managers would have juxtaposed it with the dinner on September 16 and claimed it as further "overwhelming" evidence of guilt. The point in the first instance is that there is *no date* during this period on which the judge *could have spoken* with Borders that the House *could not have* juxtaposed with an event in Borders's corrupt scheme to cast doubt on the judge. The point, in the second instance, is that this is a man so painfully honest that he speaks the truth even when it provides evidence that can be manipulated against him.

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[128] House Mem. at 42.

[129] Comp. St. II, ¶ 70.

14-15. ***October 2 and 4: Borders Did Not Contact the Judge.*** **The House reports:**

> On October 2, 1981, after telling Rico that he would check on the promised order vacating the forfeiture order, Borders called Judge Hastings' chambers and asked to speak with the judge.
>
> On Sunday, October 4, 1981, the day Borders told Rico that he had not been able to reach anyone about the order, Borders called Judge Hastings' residence and left a message for the judge to call.[130]

Three points bear emphasis. First, there is no evidence of contact between the judge and Borders on those dates or on any date after September 21 and prior to 5:12 p.m. on October 5. Second, the House invites the Senate to speculate against the evidence about contacts its managers wish had taken place and to assume that these speculations should be accepted as facts proven. Third, the House misstates the evidence in a potentially significant way.

The call on October 2 was made by Cynthia Rogers, a receptionist who worked for James Cobb, another former president of the NBA and a friend of the judge, and Dudley Williams, another lawyer in the office who knew the judge, as well as Borders. The call was made one hour and forty minutes after Rico/Romano's earlier call to Borders. Rogers does not say in her call to the judge's chambers that she is calling for Borders. The judge in any event was not there. There was no contact between Borders and the judge.[131]

There is no further indication in the available telephone records of contacts or possible contacts between the judge and

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[130] House Mem. at 42.
[131] Comp. St. II, ¶ 73.

Borders. The only basis upon which the House or the prosecution knew Borders had tried to reach the judge on Sunday, October 4, came from the judge himself. It was the judge who disclosed that his mother had said to him that Borders called and left a message concerning Pride while the judge was at the Sonesta Beach Hotel on Key Biscayne attending a meeting of the Florida NBA.[132]

The House invites the Senate to infer, reasonably, that Borders wanted to talk to the judge, at least on October 4. The House invites the Senate to speculate, against the evidence, that what Borders wanted to talk to the judge about was the *Romano* order as opposed to Pride or the dinner-cruise or other matters. The House invites the Senate to combine this speculation and speculate further that the two did talk prior to 4:12 p.m. on October 5, in the face of the fact that the FBI's timely and supposedly thorough 1981 investigation revealed no evidence of any communication between the two. These speculations assume the judge's guilt and ask the Senate to treat the assumption as evidence. There is in any event a further flaw in the House's logic discussed in the section that follows.

16. *October 5: The Instruction to Miller and the 5:12 p.m. Call Concerning the Letters for Pride.*

> On October 5, 1981, Judge Hastings told his law clerk to get the *Romano* order out that day. At 5:12 p.m. the same day, Judge Hastings called Borders and had the coded conversation.[133]

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[132] *Id.*

[133] House Mem. at 42.

The House's juxtaposition conflicts with the evidence. At 4:22 p.m., Borders assured Rico/Romano that the matter had "been taken care of" and "your friend should tell you something." There is no evidence of any contact between Borders and the judge, between September 22 and that 4:22 p.m. call,[134] and the obvious and plausible inferences are that Borders had another source or that he knew that the judge would be leaving Miami on October 7 or 8 and was hoping the order would be out by then. That point has been made.

There is a further point that has not been made. If Borders and the judge had spoken at any time prior to 4:22 p.m., as the managers speculate above, and if the judge were a participant in Borders's corrupt scheme, there would have been no need for a "coded conversation" at 5:12 p.m. The judge would have known that the deal was still on the tracks. Again the House's proposed speculations conflict with each other and cannot be reconciled with any of its theories of how the evidence establishes guilt.

17-18. ***October 8 and 9: Admitted Reality Reconstructed to Cast Suspicion.*** **The House reports:**

> On October 8, 1981, Judge Hastings called Borders and arranged to stay at the same hotel when he came to Washington, D.C. on October 9, 1981. October 9 was the day Rico was to make the final payment on the bribe.
>
> On October 9, 1981, William Borders picked Judge Hastings up at the airport. They spent the morning together. Around noon, Borders left Judge Hastings in order to meet Rico for the final payment of the bribe.[135]

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[134] *Id.*
[135] House Mem. at 42.

Nowhere is the extent to which the House's case depends upon improper juxtaposition better illustrated. The dinner-cruise had been scheduled for October 9 since early September. The judge was one of the sponsors and had planned to attend from the outset. Borders was aware that the dinner was being given. The judge's call on October 8 and the two men's activities on the following morning are precisely the events that should have occurred given their relationship and the scheduled event.[136]

It was the FBI that arranged the events so that the payoff would take place in Washington on October 9. Rico/Romano had offered to try to make the trip to Washington and to call Borders when he arrived.[137] On October 8, even Borders could not have known whether or when Rico/Romano would arrive and call. On October 9, Borders did not learn that Rico/Romano had come up for the payoff until after he had "picked Judge Hastings up at the airport" and after they "had spent the morning together."

These events cannot be marshalled to support an inference of guilt. The House's attempt to juxtapose them in this manner merely illustrates the kinds of improper juxtapositions upon which their case depends. The FBI sought to manipulate events in a way that might cast suspicion on the judge. The outrageous decision to arrest Borders at the scene suggests this may have been intentional. The House's request that the Senate draw an inference against the judge based upon the

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[136] Comp. St. II, ¶¶ 49, 68, 82, 85, 86.
[137] Comp. St. II, ¶ 83.

FBI's manipulation of events of which even Borders had no knowledge is outrageous.

19. *October 12: The Judge's Call to Borders's Mother.* The House reports:

> Three days after Borders' arrest, on October 12, 1981, a call was placed from Judge Hastings' home phone to Borders' home phone. The call lasted two minutes.[138]

The House fares no better on this purported contact. It asks the Senate here, as throughout, to indulge a presumption of guilt. Apart from the judge's explanation, there would have been nothing improper about the call. An innocent Judge Hastings would have had reason to inquire of Borders. He would have had reason, certainly after learning of the FBI's invasion of his chambers, to suspect the FBI, and he might fairly have wondered whether Borders, too, was the victim of a setup. But there is no basis here for such speculations because the record contains the judge's account.

The judge's mother asked the judge to call Mrs. Borders to find out how she was doing in the face of her son's adversity. The judge complied with his mother's request. The House's proposed speculations would be reaching in any event; when it is offered against one in the position, and with the experience of the judge and his family, it is worse.[139]

The House's claimed "pattern of contacts" theory is based upon possibilities. The record reflects only four telephone conversations of apparent substance -- a three-minute call on

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[138] House Mem. at 42.

[139] Hastings, 2B at 2271-72, 2392-93.

February 20, a four-minute call on September 10, a call recalled by the judge on September 20 or 21, and the recorded conversation on October 5.[140] The record invites speculations about other possible contacts -- about possibilities established by records indicating some eight calls of a minute or less, some ten message slips and a recalled message, and about possibilities created by the fact that Borders may have been in the same airport at the same time as the judge on two occasions.[141]

The House claims each of these possible "contacts" as a "proven fact," and asks each Senator to so infer. From each of the facts so proven, it invites each Senator to infer further that the judge spoke with Borders on each occasion. From a juxtaposition of the earlier occasions with events in the *Romano* case prior to July, the House invites each Senator to infer further still that what they talked about was the *Romano* case. From a juxtaposition of the later occasions with events in the *Romano* case and the indicated contacts between Dredge and Borders and events in Operation Apple Eye over which the judge had no control and in which he was not involved, the House invites the Senators to infer further still that what they had been and were talking about was a scheme to extract a bribe from the Romanos. This is what is known as piling inference upon inference upon inference . . . .

That would be improper in any case, but here the very points at which the House claims the necessary web of inferences is anchored in reality are not established. At least some of the claimed contacts did not occur. At least some of the contacts between the judge and Borders must have been innocent. Which contacts should be eliminated as unproven? Which shall be taken as evidencing innocent conversations? Eliminate those: Is there still a pattern to be inferred? How tightly is it woven? What does it show?

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[140] Comp. St. II, ¶¶ 7, 56, 70, 76, 77.

[141] Comp. St. II, ¶¶ 12, 14, 24, 26, 32, 56, 58, 73.

The burden is not upon the judge to dispel the web of suspicion created by others. The burden is upon the House to establish a web showing certain guilt. Here the evidence does not even show that many of the "contacts" to which many of the web's strands are supposedly anchored were events that occurred at all. The judge has provided largely corroborated explanations for those contacts which the evidence establishes as real, and the data concerning the remaining possibilities are consistent with innocence. In any fair view, no pattern could be fairly discerned, and certainly not one that anyone could fairly claim had been established as probable on the state of the evidence presented by the House.

Moreover, it is also clear that there were records of communications between the two men and more importantly calls from Pride and other events that cannot now be reconstructed. These records would have made it possible to assess and challenge the pattern that the House seeks to construct after-the-fact and could have further corroborated and refined the pattern of innocence shown by the judge's testimony and by a juxtaposition of the indicated contacts with the innocent events that occurred that year. That evidence has been destroyed. The evidence before the Senate is unfairly biased. It includes only that data which those who set out to develop the case against the judge attempted to gather with their largely unlimited resources. It does not include data that should have been obtained if an effort was to be made to reconstruct a pattern that was complete.[142]

B. "Shows of Proof," William Dredge, and Committee Concerns

In reality, the only evidence that lends a colorable basis for the "pattern" the House would construct is the testimony of William Dredge. The dangers in Dredge's testimony are illustrated by the extent to which the pattern is dependent upon the current version provided by that same Dredge. That is the subject to which we now turn.

1. *An Overview.* The evidence also shows "contacts" between Borders and Dredge. In the House's view, a comparison of the sequence and timing of these "contacts" with events that occurred in the *Romano* case and "contacts" between Borders and the judge strengthen the web of inferences through which it asks Senators to find "overwhelming" evidence that the judge was a participant in Borders's corrupt scheme. In point of fact, the web as woven is inadequate to conceal its major flaws, such as those developed in the judge's brief,[143] and many of its strands are grounded in speculation rather than evidence, a point developed immediately above. So large

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[142] *See* App. B.

[143] *Brief for Respondent: Judge Alcee L. Hastings* ("Resp. Br.") at 14-29..

a portion of the web itself, however, is grounded upon the testimony of William Dredge that his testimony merits analysis here.

The fact that so much of the House's case depends upon William Dredge should trouble every Senator. It is undisputed that Dredge is a practiced liar. By his own account, he lied to Borders and to Joseph Nesline. By his own account, he lied to the FBI, if the records of his early interviews are to be credited. By his own account, Dredge lied to further his own interests. By his own account, he lied to Borders to persuade him that Dredge was brokering a deal with the Romanos. By his own account, the story he told the FBI was designed to persuade its agents that the value of his information and cooperation merited the deal he sought in his drug case. In any account, Dredge is the only participant in this unholy alliance who emerges, on the evidence, as competent, and it is clear that what Dredge is competent at is lying to serve his own interests.[144]

Every Senator should also be troubled by the fact that the evidence supports at least two conflicting views of the role Dredge played in the events that gave rise to the accusations against the judge. The first is the role indicated by the available records and corroborated in significant part by the account Dredge gave in the unrehearsed testimony he gave before an investigating committee of judges (the "Investigating Committee") in 1985.[145] The second is the role indicated by the account Dredge gave before the Impeachment Trial Committee in 1989, an account that cannot be reconciled with the available records or his prior statements.[146]

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[144] Comp. St. I, ¶¶ 34, 37.
[145] Resp. Exs. 2 and 3, 3B at 1994-2172.

Every Senator should be aware of both views and of two further points. First, it is likely that neither of the two views suggested by the evidence is wholly accurate. Dredge is a liar, and the witnesses and records necessary to determine his true role are no longer available. Second, large sectors of the web of inferences upon which the House case rests collapse unless the Senate accepts the improbable account that this practiced liar provided in his testimony before the Impeachment Trial Committee as entirely true with the degree of certainty required in this case.

2. *The Circumstantial Evidence Concerning Dredge: A Reprise.* William Dredge first met Borders at the end of April or in early May 1981. If Borders ever promised Dredge that the judge would grant a *sua sponte* continuance in the *Romano* case, the promise was made on July 7.[147] On July 8, the judge sentenced the Romanos to three years in prison.[148] If Borders made that promise, these events confirmed the view that Dredge held from the outset: Borders was nothing but a corrupt "rainmaker" who lacked even the power to fix a continuance in Judge Hastings's courtroom.[149] That was the only view of the

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[146] Dredge, 2A at 76-173.

[147] Dredge, 2A at 129; Resp. Ex. 2, 3B at 1994-2148 *passim; id.* 3, 3B at 2149-72 *passim;* Dredge, 2A at 131; House Ex. 19, 3A at 227; House Ex. 18, *id.* at 220; House Ex. 215, 3B at 1739-1767; Resp. Exs. 27-A through 35-A, 3B at 2415-2454 *passim;* House Ex. 196, 3B at 1712-17.

[148] House Ex. 2, 3A at 14.

[149] Resp. Ex. 2, 3B at 2025-26.

evidence that comported with the testimony Dredge gave before the Investigating Committee in 1985 *and* with the telephone and travel records indicating contacts between Borders and Dredge in 1981.[150]

There is no dispute in the evidence on a further point. Dredge was arrested on May 10, and from that point onward he sought to fix or make a deal in his drug case that would keep him out of prison.[151] Dredge, by his own account, lied to Borders about Dredge's dealings with the Romanos to keep Borders's interest alive so that Dredge would have something to offer the government in exchange for a deal in the drug case.[152] Against that background, the telephone and travel records and the tapes of Borders's conversations with Rico/Romano can be marshalled to indicate what really happened.

Dredge lied to Borders and to the FBI so that he could create a deal that would implicate the judge as well as Borders. He did this to maximize the value of his cooperation and the benefit of his deal with the government.[153] Dredge told the government that he had known Borders for years and implied that he had overheard Borders discussing bribes with the judge to persuade the FBI that his information was valuable.[154] Dredge learned from the FBI (or other sources) that Miller was working to complete a major order in the *Romano* case revisiting the forfeiture issue in light of *Martino* and *Peacock* and that Miller's term as clerk in the judge's chambers was scheduled to end in September.[155]

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[150] The first crucial hinge in Dredge's story is fixing the date of his first conversation with Borders. Whether true or not, the account of the number of and intervals between the meetings and conversation that occurred between that date and the date on which Dredge claims Borders promised that Judge Hastings would grant a *sua sponte* continuance is largely consistant. The interval is about two months in both versions. If the first conversation occurred at the end of April or in early May, as Dredge testified before the Investigating Committee, then Dredge's testimony *corroborated* by telephone and travel record fixes the date of Borders's alleged promise as July 7. If the first meeting occurred in March, as Dredge testified before the Impeachment Trial Committee, then the account supports an *uncorroborated* inference that the alleged conversation took place on May 10.

[151] E.g., Dredge, 2A at 92-93. Resp. Ex. 6, 3B at 2340, 2098; Resp. Ex. 2, 3B at 2047, 2048.

[152] Resp. Ex. 2, 3B at 2026, 2140.

Dredge gave the information to Borders and, as the claimed representative of the Romanos, suggested the Romanos might be more reassured with two shows of proof -- a timely issuance of the favorably revised forfeiture orders as well as the judge's appearance at a restaurant at a designated date and time.[156] Prior to September 12, he kept each side sufficiently informed about the contours of the deal likely to be acceptable to the other in order to assure that a deal would be simply made at that first meeting. After September 12, Dredge continued dealing with Borders as well as the FBI to assure the deal remained on the tracks. This view is consistent with and is supported by the circumstantial evidence generated in Operation Apple Eye and in the investigations that followed.[157]

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[153] Resp. Ex. 2, 3B at 2048.
[154] Resp. Ex. 11, 3B at 2375; Resp. Ex. 10, *id.* at 2367.
[155] Miller, 2A at 625.
[156] House Ex. 38B, 3A at 311-13, 314-15.
[157] House Ex. 23, 3A at 238, 240; Resp. Ex. 3, 3B at 2154-58, *id.* at 2161-65.

3. *Dredge's Story: The 1985 Edition.* As part of his original deal, Dredge sought assurances that his role would not be disclosed and he would not be called to testify concerning that role.[158] Despite the judge's persistent demands, he was not produced at the 1983 trial when his fresher and unrehearsed recollections might have been fully explored, properly tested, and fairly assessed.[159] Agent Murphy did, however, produce him for the Investigating Committee in 1985, and Dredge reluctantly agreed to testify there to avoid threatened contempt proceedings.[160]

Dredge's largely unrehearsed testimony on that occasion was consistent with the records that indicated contacts between Borders and him. Dredge placed the date of his first contact with Borders between the date on which his indictment was filed and the date of his arrest, April 29 and May 10 respectively.[161] The available telephone records seemed to confirm this view -- there is no indication of contact prior to May 5 and repeated indications thereafter.[162]

Dredge was also consistent on four other points. First, he claimed that it was not until their third or fourth meeting or conversation that Borders told Dredge that he had the power to "fix" the Romanos' case before Judge Hastings for a price.[163] Dredge reported that his initial view, based upon a lifetime of experience, was that Borders was just another "rainmaker" making false claims, another lawyer "blowing smoke" in Dredge's words.[164]

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[158] House Ex. 23, 3A at 236-37, 239.
[159] Resp. Exs. 49, 3B at 2503; 158, 3B at 3163-76; 159, 3B at 3177.
[160] Resp. Ex. 2, 3B at 1999-2011.
[161] Resp. Ex. 2, 3B at 2018-2020, 2077, 2091.
[162] *Id.* at 2077, 2080.
[163] Resp. Ex. 2, 3B at 2020-21, 2022-23, 2025-2026.

Third, Dredge claimed and maintained that there was one, and only one, basis justifying the change in his view. According to Dredge, Borders told him, on the day before the Romanos were to be sentenced, that the judge would, on his own motion, without request from anyone, *sua sponte*, continue the sentencing to give the Romanos time to come up with the money to fix the case.[165] According to Dredge, two days later, the day after the scheduled sentencing, Borders told him the judge had, on his own motion, *sua sponte*, granted the continuance.[166] Dredge persisted in the view that this was the only basis for his report that Borders's claimed powers with respect to the judge had more substance than smoke.[167]

Fourth, Dredge insisted that, apart from these points, he had no recollection that could be refreshed. He spent time with Agent Murphy for that purpose.[168] He was confronted with records and with memoranda and telexes reporting upon his initial meetings with the government. He expressed views on the credibility of the various authors, but otherwise maintained he had no recollection of the events in 1981 that could be refreshed in 1985.[169]

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[164] *Id.* at 2025-26.
[165] *Id.* at 2028-29, 2033.
[166] *Id.* at 2028.
[167] Resp. Ex. 2, 3B at 2029, 2035.
[168] Dredge, 3B at 2051, 2075; Murphy, IV Invest. Comm. 30.
[169] *Id.*, 3B at 2131-40, 2152-58, 2161; Dredge, 2A at 109-10.

The unrehearsed testimony Dredge gave on that occasion largely confirmed the judge's innocence. There was no *sua sponte* continuance in the Romano case, and Dredge's account of the sequence of his and Borders's contacts and the available records coincided to fix July 7 as the only date on which Borders could have made the alleged promise that the judge would grant a *sua sponte* continuance.[170]

That testimony seemingly left open only two possibilities. On the one hand, Dredge may well have been lying when he said Borders had promised the judge would grant a *sua sponte* continuance in order to conceal from Agent Murphy and the Investigating Committee the fact that Dredge never had any basis for believing that Borders's claimed powers had any substance. On the other, he may have been telling the truth, in which event Dredge would have known for certain that Borders was only "blowing smoke" on or shortly after July 8.

4. *The 1989 Reconstruction of Dredge.* Dredge's interests had changed by 1989. He had refused to discuss the matter with special counsel during the impeachment inquiry, and no attempt was made to pursue the matter.[171] It was only after Judge Hastings insisted that he be forced out of seclusion to testify here that his view changed. He reviewed his prior testimony with his own counsel and then spent fifteen hours reviewing documents and his expected testimony with special counsel for the House.[172] He negotiated a deal

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[170] *Supra*, note 37.
[171] Resp. Ex. 4, 3B at 2190-91, 2192-93.
[172] Dredge, 2A at 107-08, 111-12.

that protected his cover.[173]

These steps were consistent with the obvious view of Dredge's interests in 1989. He sought to protect the cover he had established. To do so fully, his testimony had to satisfy the needs of the House, the FBI, and Agent Murphy -- the only parties with the power to cause him inconvenience and subject him to risk of exposure. It also had to be testimony that would end, once and for all, the persistent efforts by that gadfly Judge Hastings who for eight years had sought to force Dredge to come out of his hole so that his role might be examined in light of day.

Dredge's testimony in 1989 served those interests as well as they could be served. He adjusted his testimony to fit and bolster the House's Master Chronology. This time, he said he had met Borders in the first week of March 1981 and described a sequence of meetings and conversations that conveniently fixed the occasion of Borders's promise of a continuance as an undocumented call in the morning of Sunday, May 10.[174] He adjusted his earlier account to suggest that he had suspected Borders's claimed powers might be real from the outset, not as before, that he believed Borders's claims to be the mere smoke all rainmakers blow.[175] He reported that Borders had only told him, in another undocumented call on May 12, that "his man had delivered," not as before that the judge had granted a *sua sponte* continuance.[176]

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[173] 2A at 74-75.
[174] Dredge, 2A at 76, 114, *id.* at 84-85.
[175] Dredge, 2A at 83-84, 113, 136.
[176] Dredge, 3B at 2028-29, *id.*, 2A at 85, 100, 115-117.

Dredge's accounts of the changes in his story were as facile as they were implausible. Dredge attributed the absence of evidence of contact in his telephone records from March until May to the fact that he and Borders had initiated a system of pay-phone-to-pay-phone communication during the period of Dredge's disbelief.[177] He was unable to explain why the system was not fully observed from May onward, the period in which his belief had reportedly become real.[178] According to the 1989 edition, the March origin of his relationship and subsequent activities on behalf of Borders were just selfless acts done as a favor for Dredge's old friend Joe Nesline, rather than acts precipitated by his indictment and motivated by a desire to curry favor with or set up a lawyer whom Nesline had said might be able to help Dredge with his drug case.[179]

The House asks, as it must, the Senate to credit the 1989 version of the testimony given by this career criminal and practiced liar, who had admittedly betrayed his friends and colleagues whenever his interests dictated -- a version that conflicts with most of the available circumstantial evidence and with the testimony and statements he gave on prior occasions.[180] The House accurately perceives that large portions of its case collapse unless the 1989 testimony of Dredge is credited over the account given by a respected federal judge who had earned his reputation for honesty and integrity of the highest order and whose testimony was consistent with the available circumstance and corroborated by others whose stature and reputation were comparable to his own.

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[177] Dredge, 2A at 82-83, 120-24.
[178] *Id.*, 2A at 124-26, 127.
[179] *Id.*, 2A at 78, 163-64, Resp. Ex. 19, 3B at 2401-02.
[180] Resp. Exs. 2, 3; 3B at 1994-2148, 2149-2172; Resp. Exs. 9, 10, 11, 13, 14, 15, 17; 3B at 2352-2400 *passim*.

Dredge's testimony could properly be viewed as discredited as a matter of law.[181] That he was involved in Borders's corrupt scheme and the FBI's inept operation is beyond dispute. Beyond that no weight can be properly given to any account he might give of that involvement and certainly not to an account that finds no support in, and indeed conflicts with, the available circumstantial evidence, at least that which is competent. In that view, a large sector of the House case collapses, and the May 11 continuance in the *Romano* case can be viewed for what it was -- a non-event.

5. *The Continuance in the Romano Case on May 11.* There was no *sua sponte* continuance. The Romanos were first scheduled to be sentenced on May 11.[182] The judge testified that he was prepared to dispose of pending motions and impose sentence at that time. Miller corroborated: The judge had discussed with him the sentencing which the judge was considering imposing on that date on the preceding Friday, May 8.[183] The transcript corroborated: The judge took the bench and announced he was ready to proceed with sentencing and final dis-

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[181] *See, e.g., Dixon v. Jensen*, 756 F.2d 70, 71-72 (8th Cir. 1985) (quoting standard formulation of principle in civil context); *United States v. Haderlein*, 118 F. Supp. 346 (N.D. Ill. 1953) (criminal context); *United States v. Head*, 755 F.2d 1486 (11th Cir. 1985) (contemporary validity of principle acknowledged).

[182] Sonnett, 2A at 217, 228; House Ex. 2; 3A at 11.

[183] Miller, 2A at 670-71.

position. Sonnett corroborated: He had not given notice of his intent to seek a continuance to the prosecutor or the court.[184] Deichert corroborated: Sonnett first approached him and told him he was going to seek a continuance immediately prior to the hearing on May 11, and he had observed nothing in the judge's conduct that day to indicate the judge anticipated a motion to continue.[185] Circumstances corroborated: Sonnett did not have a written motion prepared even by the start of the hearing, and the judge was sitting in Ft. Lauderdale away from his chambers.[186]

That is not the view the House asks the Senate to take. Based upon Dredge's reconstructed testimony, it asks the Senate to infer that Borders made a call to Dredge that is not reflected in the records on Sunday, May 10, in the morning before Dredge's arrest. The House urges this inference in the face of a record that shows Borders called Dredge's house later that day, after Dredge's arrest, without using a pay phone attempting to conceal a record of the call. That call is shown in Borders's telephone records.[187] The House asks the Senate to credit Dredge's assertion that it was in this Sunday morning conversation that Borders made his promise. The House asks the Senate to speculate, against the evidence, that Sonnett's intention to seek a continuance was communicated to the judge before he went on the bench and to speculate further that the judge decided that merely granting

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[184] Sonnett, 2A at 201, 216, 218, 225.
[185] Deichert, 2A at 30, 46, 56.
[186] Sonnett, 2A at 212, 217; Miller, 2A at 650.
[187] House Ex. 196B, 3B at 1713.

Sonnett's motion would be an acceptable substitute for the very specific *sua sponte* show of proof that Borders had allegedly promised Dredge.

The House cites three bases for these latter speculations. First, Sonnett acknowledged that, absent emergent circumstances, he would always try to notify opposing counsel and the court, at least by telephone, although eight years after the fact he still believes that he did not do so here.[188] Second, at the 1983 trial, when the May 11 continuance was not a fact of significance on which his attention had been focused, Miller had ambiguously reported, "I believe that Neal Sonnett had contacted Judge Hastings's chambers and requested the sentencing be continued because he was going to file some post-trial motions." And third, because this time Dredge altered his account, and said Borders had told him, in another undocumented call on May 12, that, "You know, in fact, my man delivered. The case was postponed." The evidence would not be sufficient to establish the judge had notice, even if Dredge's reconstruction of the scenario were correct. The more important point is that, unless Dredge's account is accepted in full, the May 11 hearing is irrelevant.

Nothing Dredge said can fairly be viewed as having any bearing upon the truth. Certainly a chronology:

> (a) attested to by an admitted self-serving and practiced liar;
>
> (b) who had reconstructed it eight years after the fact and after more than fifteen hours of studying what was wanted and the supporting records;

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[188] Sonnett, 2A at 216.

(c) that conflicted with both of the prior accounts he had given;

(d) that was unsupported the records that remain; and

(e) that conflicted with the only unrehearsed version he gave, a version that was consistent with and corroborated by the records that remain

cannot be given any weight and certainly not the weight the House must assign it here.

C. Two Further "Shows of Proof": An Innocent Dinner and an Untimely Order

The House focuses upon two additional events -- the judge's having dined at the Fontainebleau and his having issued the Romano order on October 6 -- as important evidence of that he was a guilty participant in Borders's corrupt scheme. The first was an innocent act produced by Borders's manipulation of an unsuspecting judge. The second is strong evidence of innocence precisely because it conflicted with both the letter and the purpose of Borders's promise. The only aspect of Borders's promise that would have constituted a "show of proof" was its timing, not the fact of its issuance or its content. Borders promised that it would be issued not later than September 29. It was issued later than September 29, considerably later. These points and the supporting evidence are developed and analyzed above and in the judge's brief.[189] Here we analyze the arguments the House advances to support a contrary conclusion.

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[189] Resp. Br. at 15-18, 23-25.

1. *Dinner at the Fontainebleau.* The House argument is based, in part, upon inferences from facts that it argues are "proven." First, it argues that the evidence establishes that Judge Hastings and William Borders met at D.C. National Airport on September 11. Second, and based largely on the first, it argues that the judge expected Borders to return and report on September 12. The first fact has no support in and indeed conflicts with the direct evidence. The second conflicts with the direct and circumstantial evidence. Logic and common sense suggest that if the first meeting had occurred, the second would not have, and if the second had been a meeting to discuss a corrupt plan, the conspiracy would have ended there. These points are also developed above.

A third prong of the House argument stems from its claim that it was Rico/Romano who suggested a dinner and who chose the Fontainebleau. In point of fact, it was Dredge who had told the FBI that Borders had previously suggested a dinner at a specified restaurant as a show of proof. In point of fact, Borders rejected Rico/Romano's suggestions until Rico/Romano came up with the Fontainebleau.[190]

A fourth prong depends upon the fact that it was Borders who specified Wednesday without requesting time to consult the judge. The proffered inference overlooks the proven facts that the judge had been in regular contact and that the Borders dinner-cruise was upcoming; that Dredge had been conning Borders into believing that a deal was forthcoming; and that

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[190] Dredge, 2A at 83-84. Resp. Ex. 2, 3B at 2059-61; House Ex. 38B, 3A at 314-15.

Borders would have had every reason to inquire about the judge's plans and travel schedule under the guise of normal conversation.

The fact the judge regularly attended the court's early evening "business" meetings on Wednesdays is exactly the kind of information a "rainmaker" would have elicited and filed for use. It *was* Borders who chose the Wednesday. That *was* a Wednesday on which the judge was scheduled to attend a meeting with his colleagues on the court. It *was* the judge's regular practice to dine out after those meetings.[191] These are innocent facts that a judge might well have disclosed in the course of normal conversations with a prominent lawyer and ostensible friend. These are the kind of facts on which corrupt "rainmakers" depend.

The remainder of the House's argument illustrates the dangers inherent in examining acts that are intrinsically innocent acts in an effort to construct after-the-fact arguments showing the innocent act was on that occasion evidence of corruption. Both sides concede that the judge's presence was produced by a request from Borders. The judge has testified that the request was framed as an invitation to meet Borders. The House claims that the judge's conduct on the occasion demonstrates that the request and the appearance were part of a conspiracy in which the judge was a knowing participant. The House argument depends upon an analysis of the judge's actions on the occasion and an argument that these actions were inconsistent with his explanation.

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[191] Hastings, 2B at 2246-47; House Ex. 156, 3A at 821.

The dangers in this kind of argument can be demonstrated by an analysis of four facts that are *not in dispute* concerning the judge's conduct on that occasion:

> *First*, the judge and his date, Essie Thompson, arrived at the Fontainebleau at 7:45 p.m. and proceeded to the main dining room.
>
> *Second*, the judge did not object when the waiter removed two place settings.
>
> *Third*, after drinks had been ordered, the judge excused himself, left the main dining room, entered another restaurant and lounge on the same floor and then returned to the main dining room and rejoined Ms. Thompson.
>
> *Fourth*, upon his return, the judge explained his behavior to Ms. Thompson by reporting he had been looking for "friends from D.C."[192]

Any argument about these events depends upon the answer to two questions, answers that are based upon assumed but unstated norms.

> How would an innocent person have behaved if the facts were as Judge Hastings has reported them?
>
> How would a corrupt person have behaved if the facts were as the House claims them?

The speculative nature of arguments such as those made by the House stems from the fact that there are no well-established norms applicable to situations such as these. The point may illustrated by example and question.

Judge Hastings was a federal judge prominent in the local black community. Ms. Thompson was a young black professional who was an occasional date. Borders was a prominent black lawyer and the President of the National Bar Association. According to the judge, Borders had failed to appear for dinner engagements before, most recently during the judge's visit to Washington in July. Borders had made a similar commitment to appear on September 16.

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[192] Comp. St. II, ¶ 65; Rep. at 68.

How would a reasonable and innocent Judge Hastings have acted in these circumstances? Would he have told his date in advance that she could expect to meet a prominent Washington attorney who was the immediate past-president of the National Bar Association at dinner? After he arrived and saw that Borders was not yet there, would he have protested when the waiter removed two place settings? When the potential prominent guest had not arrived by 8:00 p.m., would a reasonable Judge Hastings have had him paged or left his date at the table while he combed every restaurant in the hotel?

Or would a reasonable and innocent Judge Hastings have, consciously or unconsciously, eliminated the risk of embarrassment while preserving the prospect that she would be surprised and appropriately impressed when and if a former president of the National Bar Association from Washington came to the dining room to meet with her date? When the prominent guest did not appear, would a reasonable Judge Hastings have contented himself with a trip through the lobby and quick look in the nearest alternative restaurant and a prompt return to his date with a report that he had been looking for "friends from D.C." to excuse his absence?

If the House view were correct, how would a corrupt judge have behaved? Would he have gone to dinner alone to confirm to any observers that his sole purpose was to show his approval of the corrupt enterprise? Or would he have taken a date as a cover? If he was taking a date as a "cover," would he have embellished his cover by telling her that they were going to meet a "William Borders" in terms so firm as to assure she would recall the conversation? If this corrupt judge wanted to establish a "cover," would he have contented himself with a quick visit to one other restaurant or would he have left messages at the desk and in every restaurant and lounge in the hotel to assure that someone would remember?

The House's arguments depend for their validity and strength on the extent to which and certainty with which questions such as these can be answered. They are questions that could not be answered with confidence in any event, and they are questions that could only fairly be considered by those who could place themselves in the position of a Judge Alcee L. Hastings. The House arguments on this point are insensitive and speculative at best.

Judge Hastings had dinner at the Fontainebleau because Borders said he would be there. The judge took a date without reporting the expected meeting because he knew that there was a risk that Borders would not appear. That is the only view that anyone could fairly take on the evidence now before the Senate. That is the only view the jury could have taken in the face of the similar arguments that the prosecutors made in 1983.

2. *The Untimely Order of October 6*. The House does not even address the gaping hole in its web. Borders promised the order would be out no later than September 29. The "show of proof" was to be *issuance* of the order *on or before that date*. The "show" did not occur. This is strong, if not dispositive, evidence of the judge's innocence. This point, the House ignores. The House does not devote any of its 171 pages to addressing this point for one reason: It cannot be addressed.

Both the relevance and the force of the arguments the House does make are dependent upon a condiditon that was not fulfilled. If, but only if, the order had been issued on or before September 29, then, and only then, might the House fairly ask the Senate to examine the circumstances surrounding a timely issuance to see whether they undermined confidence in any explanation the judge might have given. The condition was not fulfilled, and the circumstances surrounding the issuance of the order are largely irrelevant. Moreover, the House's attempt to generate strands for its web that might conceal the hole is also flawed.

First, information Borders had about the *Romano* case is the kind of detailed knowledge that is a rainmaker's stock in trade. How else would they sell their claimed wares? Moreover, Borders had other possible sources. The FBI knew the judge was preparing a substantial order on the motion to reconsider the original forfeiture through reports from Deichert. Deichert must also have told them that a close study of *Martino* would compel the return of that substantial portion which constituted the $846,000 cash proceeds. Further Deichert would have recognized and reported that *Peacock* had emphatically reminded all district judges in the circuit that *Martino* was not a precedent to be ignored. All this information was available to the government before Operation Apple Eye was initiated.[193]

This information was available while the FBI was negotiating with Dredge, and Dredge was negotiating with Borders to keep his interest alive until the plea bargain was made and the undercover operation was designed. It was Dredge who first proposed the undercover scenario. Beyond this source, Dredge and Nesline also had other sources, including the Romanos and their associates, through whom they could have obtained detailed knowledge about the case. These are possible sources the House does not identify. These must be added to the possible sources the House does identify in assessing the strength of its argument that Borders's knowledge supports an inference about the judge's role. The judge was one of many possible sources, and no rainmaking scam could proceed unless the rainmaker could make a plausible claim that the judge was his source.

Second, the House tries to convert the absence of any evidence of communication between the judge and Borders into evidence that the two men communicated. The call on October 2, was made by a receptionist long after Rico's call and after the judge had left the office for the weekend. The call on

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[193] Comp. St. II, ¶ 48, 50.

October 4 was first reported by the judge and was a call to the judge's mother. There is no evidence of communication that would have been required to make the facts fit the House's theory.[194]

Third, the judge's explanation is confirmed by direct evidence. Miller was scheduled to go to work in Judge Paine's chambers when his work for the judge was complete. The judge was scheduled to be out of town for a large portion of October, and the days he would be there were clustered at the end of the month. Miller had prepared an extensive draft by the end of July, a fact the judge would have known from occasional briefings or from their conversation in early September.[195] In circumstances such as these, even generally affable senior officials may be forgiven an occasional precipitous demand to a short-time, junior staff member, an "I want it now" demand, without exciting grounds for suspicion.

The debate about fine points such as these should not obscure the obvious from any Senator's view. Borders's promised that the judge would issue the order on or before September 29 as evidence that Borders had the power he claimed. Judge Hastings did not issue the order by September 29. That is evidence that Borders *did not* have the power he claimed or any power at all.

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[194] Comp. St. II, ¶ 73.
[195] Comp. St. II, ¶¶ 38, 51, 74.

D. Examples of Complicity: The Unsupported, the Inconsistent, the Insensitive, and the Improper

1. *The Unsupported: The Call of April 9, 1985.* The speculative chain of inferences necessary to conclude that the judge spoke with Borders on this occasion and the unfounded juxtaposition necessary to even suggest they might have talked about the *Romano* case, rather than Pride or some other matter, are developed above. The only point that merits note here is the House claim that the use of the pay phone was so "clandestine" that it corroborates their otherwise unfounded speculations.

Borders was a secretive fellow in his innocent as well as his corrupt activities. He had insisted on the use of pay phones to discuss political matters with Dr. Andrew Chisolm, the Director of Minority Affairs for the Carter campaign. He has used it with Delano Stewart, a lawyer in Florida. The conduct occurred long prior to April. The record tells only that the conduct was there and was tolerated by his innocent associates, not whether it was the product of eccentric paranoia or well-grounded suspicion on Borders's part.[196]

The record also establishes that the judge's conduct was *not* clandestine. He charged the call to his home phone, thereby guaranteeing there would be a record. If the judge had wanted to be clandestine he would have either used coins in the pay phone or placed the call on the government's FTS system. The fact that the judge may have indulged Borders's eccentric paranoia is not grounds for imputing after the fact the now confirmed suspicions about Borders to the judge.

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[196] Comp. St. I, ¶ 26.

2. *The Inconsistent: The October 5 Telephone Conversation.* Four points bear emphasis:

First: There is one and only one forensic linguist in the world who has undertaken research to determine whether the use of a "code" can be reliably detected from tapes of covertly recorded conversation. That one linguist has yet to complete his research or publish its results so that the results and the method might be subjected to examination and debate among his peers. That one forensic expert is Roger Shuy.[197] The only difference between the expertise Dr. Shuy claims on this point and the expertise claimed by an astrologer is that astrologers have published their "research" and disclosed the bases for their "science" so that all may evaluate the "validity" of their claims.

Second: Whatever the 79-word conversation means, it *cannot* be interpreted as a conversation about Borders's dealings with Rico/Romano or about the *Romano* order. The 31-word passage which the House identifies as crucial is crucial indeed. If the judge were a participant in the scheme, he would have known by September 21 at latest that Borders had collected 25000 "things" on September 19 and "was supposed to go back [on October 3] and get [125,000] more things." Moreover, in the House's hypothesis, the judge would have had to have spoken with Borders earlier on October 5 or the preceding evening. In this view, the judge's information would have been current except for Borders's 4:22 p.m. conversation with Rico/Romano. In that context, Borders's response to the judge's question cannot be construed as a response about his dealings with Rico/Romano.

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[197] Shuy, 2A at 606-07.

Third, the "pause fillers" and "repeated confirmations" that Dr. Shuy found abnormal after having examined a 79-word conversation support a far more direct and simple explanation than the one urged by Dr. Shuy and the House. A prominent lawyer had urged a federal judge to circulate letters to raise funds for a mutual friend notwithstanding any ethical constraints the judge might feel. The judge had resisted. The lawyer had persisted. On October 5, the judge was making an embarrassing confession -- he had succumbed to "temptation" and provisionally decided to "sin." He made his confession in guarded terms. The lawyer understood the embarrassment and responded in kind.

The judge and the lawyer were discussing a proposed departure from ethical standards. The judge, as he has since acknowledged, *should* have been embarrassed that he had succumbed, even briefly to the temptation. If Dr. Shuy wishes to do research on the point, he should place recorders in the confessional and analyze the "pause fillers" and "repeated confirmation" in those conversations.

Fourth, the conversation is "logically consistent" with, and is only logically consistent with, the judge's explanation of the events that preceded it and the conversation itself. For example, in the 31-word passage upon which the House now rests, Borders uses "things" in a context that stipulates its meaning for that conversation. It means "information," as in "he wrote some things down for me." When it is used later in the same thought, it must have the same meaning, as in "and then I was supposed to go back and get some more" information.

3. *The Insensitive: Judge Hastings's Return to His Home Turf and His Crippled Mother on October 9.* The House does not specify the norms by which they would have Senators apply in assessing the judge's response to Pride's stunning report that the president of the NBA had just been arrested and the accusations had something to do with the judge's courtroom. But the norms are implicit in the views they urge. Two examples should suffice.

First, the judge's conduct, as the House urges it be viewed, "does not reflect an eagerness to get home to Florida so much as an eagerness to get away from the L'Enfant Plaza, the place where the FBI might come looking for him."[198] That, on the one hand, is the kind of rank speculation that requires all claims of flight be viewed with caution. One who is at point A and "eager" to get to point B cannot achieve the result without engaging in conduct that evidence also his "eagerness" to leave point A.

Moreover the House's proposed inferences conflict. The House's claims that the evidence does not show that the judge's departure from the hotel was animated by concern for his mother.[199] The House then suggests, however, that the fact that the first thing the judge did when he arrived at the airport was call his mother, rather than make arrangements for his flight, is further evidence in support of its claim.[200]

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[198] House Mem. at 86

[199] *Id.*

The judge had demonstrated his concern for his mother. She lived with him, and he cared for her. She was reclusive and crippled by arthritis. Arguments about the extent to which any son's conduct might be motivated by concern for his mother as opposed to other factors would be no more than foolish speculation in any case. It is simply insensitive to urge such foolish speculations when the mother and son have lived the lives and shared the experiences that were so different from the more conventional lives and experiences shared by most mothers and sons.

Second, the House urges the Senate to infer from the fact that the judge's return to Florida provided time for the judge to reflect upon the events that occurred before he spoke with the FBI to the conclusion that his reason for returning was that he wanted time to reflect before he spoke with the FBI. The House then urges that, from this, the Senate should further infer that the reason he wanted time to reflect was so that he could construct a story and to reason further that his need to construct a story supports an inference that he had a guilty state of mind.

The obvious response is simple: Any person who discusses serious matters with the FBI without reflecting on the events that might have given rise to them would be a fool. He or she would not advance the interests of the FBI and might risk needless embarrassment by providing ill-considered answers. The judge is not a fool. The presence of so obvious a response illustrates the reason why arguments based upon allegations of flight are properly viewed in caution. That caution dictates they be rejected as unworthy of consideration in this case.

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[200] *Id.* at 87.

III. CONCLUSION

The House managers have ably demonstrated that the fragmented and fragmentary data that remain can be marshalled to establish grounds for suspicion. The foregoing statements and analyses should suffice to demonstrate that the evidence that remains is so fragmented, fragmentary, circumstantial, and stale that it cannot be fairly marshalled to do more than create suspicion -- suspicion based upon speculations, suspicions that the data that remain are inadequate to resolve.

The statements and analyses also demonstrate that the data that remain can be marshalled to create substantial doubt about the conduct of the judge's principal accusers. One need not reach the question of motive in order to conclude that Operation Apple Eye was defective in its design, in its implementation, and in its execution and aftermath. In addition these statements and analyses should explain why those who know the judge and have studied the data are convinced that he is an innocent man who has been thrice unfairly victimized -- first by Borders's rainmaking attempt, then by Dredge's skillful manipulation, and finally by the FBI's inept undercover operation and subsequent investigations. For those who believe in the man, ~~the~~ data that remain provide sufficient basis for outrage as well as concern.

Those who study the data on this occasion need not share the outrage in order to resolve the issues the Senate must now decide. However marshalled and however analyzed, the evidence presented by the House does not satisfy the burden it assumed. It cannot be fairly marshalled to establish ground for suspicion. But the evidence and the inferences the House urges are rarely clear and never unequivocal and, for that reason, hardly convincing. At every stage and at any point, close scrutiny reveals inferences that support the judge's case. These inferences are frequently compelling, often stronger than those advanced by the House, and always among the plausible hypotheses that must be considered in a circumstantial case based upon incomplete and fragmentary data. The data cannot be marshalled to establish to anything with any real degree of certainty.

That conclusion applies equally to the remaining articles. The limitations imposed by time and resources have precluded preparation of similarly detailed statements of the evidence on behalf of the judge and analyses of the arguments advanced on behalf of the House with respect to those articles. The foregoing should suffice to demonstrate that such statements and analyses could have readily been developed had time allowed. They should, however, be unnecessary.

The remaining articles can safely be separated into two categories -- the repetitious and the ridiculous. The fourteen false statement accusations are dependent upon the main charge, and the House has largely remarshalled the same evidence in claiming each is proved. The main flaws in its arguments are developed in the *Brief for Respondent* and crossed referenced to the analysis above.[201] The detailed statements and analysis present data necessary for microscopic analyses for any who think the effort is merited.

The Mayor Clark accusations do not merit microscopic analyses. The House's case on this article depends upon its claim that the judge has failed to prove how the mayor obtained the information. The claim is correct, but beside the point. The judge has proved that the mayor's statement is in each of its particulars false. He has proved that his account of the events on the day on which they mayor claims the disclosure was made is true. He has testified emphatically and repeatedly that he was not the source. He has done more than is required. The burden is on the House, and it has failed to discharge it.[202]

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[201] Resp. Br. at 22-29.
[202] *See* Resp. Br. at 30-34.

APPENDIX D

MISCELLANEOUS MATERIALS: DUE PROCESS

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PREFATORY NOTE

Three documents should be readily available to Senators as they consider whether and what weight should be assigned the various due process concerns at issue in this case. The first describes the resourses that had been arrayed against respondent over the more than seven years that preceded the trial. It was submitted at the first hearing of the Impeachment Trial Committee in support of the then pending Motion for Funds for Respondent's Defense and respondent's claim that he should be allowed time to sufficient to redress in some degree the handicap imposed by the cumulative inbalance in resources.[1] It is included for convenience. The judge also submitted a Statement of Assets and Liabilities as of April 17, 1989, at the committee's request, to further document his need for funds. It was omitted from the record. It should be available -- now and for the future.

On May 19, the judge submitted additional material at the committee's request, to document his claim that preliminary discovery had provided a further demonstration of his need for time and funds. The accompanying statement was included in the record;2 the appendix containing the requested information was omitted. The statement and materials bear directly upon issues that in the judge's view should be matters of concern to Senators in the trial of this or any case of impeachment. For convenience, they are reproduced together here.

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1. 1 at 242-45.
2. 1 at 589-97.

RESPONDENT'S NEED FOR FUNDS, TIME, AND DISCOVERY
SOME ILLUSTRATIVE MATERIALS

I. **RECORD TRANSMITTED BY THE JUDICIAL CONFERENCE OF THE UNITED STATES.**

A. Transcript of Proceedings before the 11th Circuit Investigating Committee. (House item I.3)

1. Known Record: 28 volumes
2. Supplied to Counsel for Respondent: 28 volumes
3. Not supplied to Counsel for Respondent: Sealed portion concerning William Dredge.

B. Documents and other materials received by 11th Circuit Investigating Committee and made part of its Record. (House Items I.4 and II.)

1. Known Quantity: 1229 items[1]
2. Supplied to Counsel for Respondent: 1072 items[2]
3. Not supplied: 158 items
    a. Reported quantity not supplied: 48 items
    b. Unreported Quantity not supplied: 110 items

C. Volume Analysis: Investigating Committee Index shows 8 boxes.

1. Supplied to Counsel for Respondent (Estimated): 80% of Contents (by volume) of Boxes 1, 2, and 3 or about 30% of the total.
2. Not Supplied (Estimated): Boxes 4, 5, 6, 7, and 8 plus 20% of Boxes 1, 2, and 3 or about 70% of the total.

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[1] From daily exhibit lists. Exhibits were assigned numbers beginning with prefix "IC." In some instances, a separate IC number was assigned to each page of a document. In other instances, a single IC number was assigned to a multi-volume record. The foregoing number is based upon a manual count of the documents supplied and of the separate entries showing items not supplied.

[2] More than 30 of the items supplied were illegible in whole or in significant part or were incomplete. This number does not include an analysis of the more than 370 items related to matters not certified to the House (such as claims regarding funds raised for respondent's 1981-83 defense). A number of these were also illegible.

II. DOCUMENTS AND OTHER MATERIALS NOT MADE PART OF THE RECORD, BUT TRANSMITTED BY ORDER OF THE 11TH CIRCUIT JUDICIAL COUNCIL.[3]

A. Pursuant to Resolution dated September 25, 1987, addressed to John Doar, counsel to the Investigating Committee.

1. FBI Materials: Contacts with FBI - Vols. I - III; Oversize Documents from FBI; and Original Documents from FBI File.
2. Witness Files: 225 witness files compiled by Mr. Doar.
3. Notebooks: Eleventh Circuit Paragraph Chronology - 5 volumes; Chronology U.S. v. Thomas and Frank Romano; Digests and Summaries of pleadings and testimony in U.S. v. Hastings - 3 volumes; Day-to-Day Analysis of Activity Beginning Friday, January 2, 1981, and Concluding Tuesday, October 13, 1981; and Telephone Number Analyses of Long Distance Calls from 11 locations with supporting lists and memoranda.
4. Digest of Testimony of Witnesses Before Investigating Committee (Digests of volumes I through 25).
5. Notebook: Impeachment Material.

B. Pursuant to Resolution dated October 9, 1987, addressed to Mr. Doar.

1. File Drawer 1: U.S. v. Pride, Criminal No. 77-214, Civil Action No. 80-1649-9.
2. File Drawer 2: Exhibits from U.S. v. Borders and U.S. v. Hastings; Certain Original Exhibits; Other Complaints.
3. File Drawer 3: Delano Stewart Material; Hemphill Pride - South Carolina Disciplinary Procedures; Documents Responsive to Subpoena Served on Judicial Advisory Committee; and Hastings Discovery Material - From FBI files, Inventoried and Not Inventoried.
4. File Drawer 4: Investigating Committee Witness Digests in fourteen designated categories, and other materials.
5. File Drawer 13: Indices and Analysis of Telephone Logs; Flight Records; Materials on U.S. v. Dredge including documents received from U.S. Attorney and Judge Kauffman; and other materials.
6. File Drawer 18: Probation Files -- Thomas and Frank Romano.
7. Court Records: Apparently from litigation over Investigating Committee subpoenas to respondent's lawyers and law clerks; and
8. Miscellaneous: Drug Enforcement Agency File - Re: William Dredge; Telephone Records of Judge Hastings's chambers; other materials.

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[3] The House Managers report that these documents were examined, but that not all were transmitted.

III. ATTORNEYS, INVESTIGATORS, AND PROFESSIONAL STAFF PARTICIPATING IN DEVELOPING THE RECORD AGAINST JUDGE HASTINGS.

A. The Original Investigation and Prosecution: July 1981 - February 1983 -- 18 months.

1. Justice Department Attorneys: Robert S. Richter and Reid Weingarten and others.
2. Federal Bureau of Investigation: Anthony Amaroso, Supervising Agent; William B. Murphy, Case Agent (Miami); Robert Forster (D.C.); and numerous additional FBI agents who played roles in the investigation.
3. Time and Resources expended: Unknown

B. The Judicial Investigation: March 1983 - August 1986 -- 39 months.[4]

1. Attorneys and Legal Assistants:[5] John Doar, Chief Counsel and Principal Investigator; Stewart Webb, Assistant Counsel and Investigator; Marta Campos, Legal Assistant; Catherine Arnold, Legal Assistant or Secretary; Joseph Sullivan, Legal Assistant; and Phyllis McKown, Legal Assistant or Secretary.
2. Investigative Assistance: William B. Murphy and an unknown number of FBI agents.[6]
3. Time and Resources:
    a. Known: Messrs. Doar and Webb devoted more than 7500 hours and received more than $800,000 in payment of fees and reimbursement for costs. Legal assistants were billed at $25 to $35 per hour; amount paid unknown.
    b. Unknown: The costs incurred by the Investigating Committee for travel and accommodation for witnesses and for transcription and other costs and the time and resources expended by the FBI and other executive agencies.

C. The Improper Disclosure Investigation: September 1985 - May 1988 -- 33 months.

1. The Executive Branch (12 months): Justice Department Attorneys Eric H. Hodder, Jr., and John M. Campbell assisted by FBI Agents Christopher Mazzella, Geoffery, and others.

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[4] The investigation was not staffed until mid-April 1983 and the final hearings were held in early August 1986.

[5] The Justice Department appeared and provided support in collateral litigation.

[6] The number was sufficient that the FBI apparently maintained a separate category of files for "documents pertaining to requests for FBI assistance by Eleventh Circuit Investigating Committee in locating witnesses and documents, and conducting investigations."

2. The Judicial Investigation (21 months): Special Counsel Sydney O. Smith and Bernard Taylor with assistance from the FBI and others.
3. Time and Resources: Unknown

D. The House Inquiry: March 1987 - August 1988 -- 12 months.[7]

1. Five attorneys:[8] Alan I. Baron, Special Counsel, and Robert B. Levin, Janice E. Cooper, Patricia Wynn, and Lori E. Fields, Counsel.
2. Support Staff: Catherine Rucks, Legal Assistant; and Susan M. Manion, Anne I. West, and Cathy Jo Love, Clerks.
3. Time and Resources: Unknown

E. Impeachment Proceedings: August 1988 - March 1989 -- 8 months.

1. Four Attorneys: Alan I. Baron, Special Counsel; and Janice E. Cooper, Patricia Wynn, and Lori E. Fields, Assistant Special Counsel.[9]
2. Support Staff: Believed to be the same as C.2.
3. Time and Resources: Unknown

F. Summary and Overview:

1. The Past: There have been twelve (12) lawyers, no less than two (2) at any time, who have been properly compensated, well supported, and specifically assigned to direct and conduct investigations into respondent's conduct over the past 73 months. In the aggregate, the federal government has had available to it 244 months of attorney-time to develop the case to its present stage, the equivalent of more than 20 years of attorney-time.
2. The Future: The House Managers have and will have available more than 800 hours per month of properly supported attorney-time to aid them in preparing for and trying this case of impeachment.

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[7] Special Counsel was apparently selected in May or June and thereafter assembled the rest of the staff.

[8] Five other attorneys were identified as assisting in the inquiry.

[9] Five other attorneys are identified as "House Committee Staff Participating in the Impeachment Trial Preparation."

Terence J. Anderson

c/o The University of Miami
School of Law
Coral Gables, FL 33124-8087
(305) 284-2971

April 17, 1989

Michael Davidson, Esq.
Senate Legal Counsel
642 Hart Senate Office Bldg.
Washington, D.C. 20510

Dear Mr. Davidson:

I enclose a signed copy of the judge's statement of assets and liabilities. I was not able to speak with the judge this afternoon; so I cannot report the total amount raised for the defense since last August. The amount has, in any event, been insufficient to pay the out-of-pocket costs the judge and his counsel have incurred in connection with the case to date. As matters now stand, the judge does not have and does not expect to receive funds sufficient to enable him to adequately defend himself at a second trial.

I shall try to reach the judge this evening or tomorrow morning so that I can give you an approximate figure.

Sincerely,

Terence J. Anderson

TJA:bkw

5

ASSETS

DESCRIPTIONS	VALUE
Home	$ 155,000
Car	27,000
Stocks & Bonds	19,000
Alcee L. Hastings Defense Fund (Southeast Bank)	2,000
Alcee L. Hastings Defense Fund (Sun Bank)	200
Personal Checking Account (C & S Bank)	800
	$ 204,000

LIABILITIES

CREDITOR	AMOUNT	DESCRIPTION
Boston Safe Deposit Co.	$ 3,000	Loan
Michael Taines	10,000	Personal Loan
Chase	4,000	Loan
Miscellaneous Credit Cards	15,000	Loan
Sears	12,000	Home Account
Car	20,000	Loan
Home	121,000	Mortgage
MORI	9,000	Mortgage
	$ 194,000	
Terence Anderson	$1,500,000	Legal
Patricia Williams	250,000	Legal
Robert Catz	200,000	Legal
Karr & McLain	200,000	Legal
Mark McDonald	15,000	Legal
Lewis Myers	15,000	Legal
	$2,180,000	

The above legal fees represent an estimate on the low side. I have not sat down with each lawyer and come up with the exact figure that I owe each one.

Alcee L. Hastings
ALCEE L. HASTINGS

April 17, 1989
DATE

In the
SENATE OF THE UNITED STATES
Sitting for the Trial of an Impeachment

THE HOUSE OF REPRESENTATIVES,
OF THE UNITED STATES,
plaintiff,

v.

THE HONORABLE ALCEE L. HASTINGS,
a Judge of the United States District Court
for the Southern District of Florida,
respondent.

A STATEMENT CONCERNING JUDGE HASTINGS'S NEED FOR TIME AND FUNDS TO DO NOW WHAT THE HOUSE SHOULD HAVE DONE BEFORE IMPEACHMENT: THREE ILLUSTRATIONS WITH SUPPORTING DOCUMENTS

On May 10, 1989, counsel for Judge Hastings submitted a memorandum concerning the need for time and funds. That memorandum gave three illustrations of the kind of information that his counsel had found through a cursory review of FBI files recently provided. This supplemental statement presents those illustrations with an Appendix ("A") containing supporting documentation.

The Recent Production and the Nature of the Work Now Required: Three Illustrations

On April 26, 1989, counsel for respondent received approximately 16,000 pages of material representing copies of files and other materials which the House had obtained from the FBI. An inventory of those materials is appended to this memorandum (A.1-4). Some of those materials were duplicative of materials counsel had previously examined;

most, however, were new. Even materials that were previously examined must now be re-examined in the context of the files of which they are a part in order that their significance might be properly assessed. Based upon his preliminary assessment, counsel for respondent has concluded that approximately 14,000 pages must be examined with some care.

Three points discovered to date should suffice to illustrate the relevance and importance of these materials and the need to afford counsel sufficient time to review and digest them with care: .

1. Nesline's Report to the FBI -- Hastings is Innocent; Doar's Response -- Who Cares? In the course of a 1985 investigation, Joseph Nesline, the Washington underworld figure, who must have known, expressed his view: Borders had no control or influence over Judge Hastings and was simply running a scam (A.6).[1] Nesline also disclosed that Borders was sending him letters through an intermediary and that Nesline was sending Borders money in prison. The FBI files disclose that the FBI made this information available to John Doar and that Mr. Doar advised the FBI that the Investigating Committee did not want the FBI to pursue further inquiries along this line (A.7-8). The fact that the Inves-

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[1] Nesline's reported statement that "his knowledge came from the papers and that he did not know any of this first hand" conflicts with the view taken by everyone who has investigated the case and must be rejected. According to the FBI and the Investigating Committee, it was Nesline who introduced Dredge to Borders and Nesline who brokered a deal between Santos Trafficante and Borders. Nesline's knowledge was such that he spent eleven months in jail because he refused to disclose that knowledge to the 1981 grand jury, even after he had been granted immunity.

tigating Committee did not even seek to compel Nesline's testimony even after receiving this information can only be described as stunning in light of these disclosures.

This is an outrage that cannot be ignored. It now appears that in 1985 there was evidence in the form of Nesline's testimony and Borders's letters that might have established Judge Hastings's innocence conclusively. If the investigation had been pursued, it must in any event have generated additional evidence corroborating the judge's claims. The fact that this evidence was not immediately and vigorously pursued by the FBI and by the Investigating Committee is an outrage. The fact that the evidence was not pursued by the House subcommittee during its year-long inquiry is an outrage. The fact that the material was not (and but for the Impeachment Trial Committee's order might never have been) disclosed to respondent is an outrage.

These facts alone should foreclose any further platitudinous claims that the House conducted a thorough and impartial inquiry or that its staff has long since provided respondent with all materials necessary to prepare a proper defense. In respondent's view, these disclosures and the outrages they reveal should suffice to end these proceedings.

There are different kinds of due process violations that can arise from improper governmental conduct. Two are relevant to the issues here. There are, on the one hand, violations that are unrelated to an accused's guilt or innocence -- *e.g.*, an unlawful search and seizure that produces otherwise sound evidence of guilt. But there are, on the other, violations that are directly related to the accused's guilt or innocence -- *e.g.*, those that occur when prosecutors ignore or suppress evidence that might exculpate the accused or aid him in establishing his innocence. Whatever view one takes concerning the relevance of the former, the presence of the latter cannot be ignored. The materials now made available make it clear that violations of the kind that cannot be ignored occurred in the post-acquittal investigations in this case.

Full consideration of these violations and their significance must be deferred to a later date. But the presence of these materials in the recently produced files makes it clear that respondent must now be allowed time to fully examine the materials provided and to pursue now inquiries that should have been pursued over the past four years, to the extent that remains possible. That will take time and resources, but issues of this kind are not issues that can properly be swept under the rug and ignored in the name of expedition and expediency.

2. FBI Agent Mazzella Lied About Mayor Stephen Clark. Christopher Mazzella was the supervisory agent in Miami who directed the FBI's investigation into the alleged disclosure to Mayor Clark. On June 1, 1988, during the hearings before the House subcommittee, FBI agent Mazzella was repeatedly asked whether the FBI had any information that called Mayor

Clark's credibility into question or that might have given the FBI leverage in inducing his cooperation against Judge Hastings. Two exchanges should suffice to illustrate the tenor of the questions and his responses:

> MR. EDWARDS. I am sure you checked out carefully important witnesses in the FBI files?
> MR. MAZZELLA. Right.
> MR. EDWARDS. . . . [C]an you tell us, is it absolutely clean insofar as FBI files are concerned with Mayor Clark?
> MR. MAZZELLA. I can't make any representation of that from my point of view here without checking it further, but let me put it this way. There is nothing in his record or in any information we have that would tend to make me think he is lying.[2]
>
> ***
>
> MR. BRYANT. . . . One final question. You were well aware that people quite often want to be cooperative with the FBI in the event they are facing some type of trouble themselves. That is, prosecution or investigation or some other concern about what your intention towards them might be. I want to ask once again for you to make it clear to us, Mayor Clark's situation in that regard. *Did the FBI have any type of leverage at all over Mayor Clark at the time that he told you about Judge Hastings' disclosure to him?*
> MR. MAZZELLA. The only leverage we had were his own words on tape. Whatever that is worth. *There were no prosecutive -- no potential prosecution against him.* We didn't confront him with the possibility of other charges if he didn't cooperate. And their really, wasn't anything we had on him to convince him to testify truthfully.[3]

That was the sworn testimony of the FBI's supervisory agent on June 1, 1988.

The FBI materials produced on April 26, 1989, contain a telex dated March 3, 1986, from the Miami field office to FBI headquarters in Washington concerning the investigation. In explanation of its proposed strategy, the telex reports:

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[2] *Impeachment Inquiry: Hearings* at 412.
[3] *Id.* at 416-17; emphasis supplied.

> On the other hand, Miami does not believe locking Clark into his testimony by way of Grand Jury appearance prior to consensual monitoring is necessary for the following reasons:
>
> . . .
>
> 2. The Department of Justice (DOJ) has already authorized the prosecution of Clark under Title 18, U.S.C., Section 1001 [making false, fictitious, or fraudulent statements]. Clark's testimony before a FJG could significantly impede prospects of such prosecution thereby eliminating a bargaining tool in seeking Clark's cooperation.
>
> . . .
>
> 4. DOJ is opposed to commiting [sic] Clark's testimony to FGJ record at this time because as mentioned early it could impede section 1001 prosecution. Further, DOJ wants Clark fully debriefed through more extensive interviews so that future trial testimony will not be flawed or contracted by inconsistencies derived from early FGJ testimony.

(A.12-13) There is little reason to expect that agent Mazzella's respect for an oath to tell the truth before a committee of the Senate will be any greater than that shown by the testimony he gave under oath before a subcommittee in the House. That, however, is beside the immediate point.

The House subcommittee should have provided counsel for Judge Hastings a copy of that telex before its hearings. That telex should have been before the members when they questioned agent Mazzella. At a minimum, the impeachment trial staff should have brought the telex to the subcommittee's attention during or soon after agent Mazzella testified.

The fact that none of these steps was taken establishes two points that are relevant here. The House managers can no longer suggest and the Impeachment Trial Committee cannot properly require that Judge Hastings's right to compel the production of documents be governed by determinations made by his accusers concerning what constitutes material that should be disclosed in the interests of justice. The fact that materials which may contain telexes such as the foregoing have been withheld to this late date renders that position untenable. Second, respondent must now be afforded adequate time to examine and analyze the materials that have now been produced (all 16,000 pages of them) as well as those that must be produced in the future, *before* his counsel are required to make decisions concerning stipulations or other matters that may affect the conduct of the trial and respondent's ability to defend himself.

3. The Decision to Arrest Borders at the Scene of the Payoff. At the 1983 trial and before the Investigating Committee, agent Murphy testified that a spontaneous concern for the undercover agent's safety was a significant factor in the decision to arrest Borders at the scene of the payoff rather than letting him take the money to determine whether funds would be paid to Judge Hastings. On the eve of the hearings before the House subcommittee last spring, we obtained a copy of an FBI telex dated October 8, 1981, which confirmed that the FBI had in fact planned in advance to arrest Borders at the scene and that the decision was based upon factors unrelated to concerns about the agent's safety.

The materials just produced reveal that the proposed arrest scenario had been developed by September 24, 1981, and was predicated upon Judge Hastings's issuing the *Romano* order by September 30, 1981, as Borders had promised (A.32-33). These materials confirm that Mr. Weingarten and Agent Murphy were aware that Borders was a rainmaker who had claimed to have the power to fix cases with judges in addition to Judge Hastings (A.18). Nonetheless, they were "dedicated to the prosecution" (A.22) even before the undercover operation had been approved (A.15-26). Those documents also show that Director Webster and other senior FBI officials were more skeptical from the outset (A.27, 30-31). They also indicate that the decision to arrest Borders at the scene of the payoff was predicated on the view that Borders's appearance there would generate more than enough evidence to warrant his prosecution, but that, absent further evidence, even the dinner at the Fontainebleau *and* the issuance of an order on September 30 would be insufficient evidence of the judge's involvement to warrant risking the $125,000 with Borders (A.34-37), a concern that even the committed prosecutor appears to have shared (A.35). Indeed, the Director's final approval of the arrest scenario was based upon the erroneous assumption that Judge Hastings *had issued* the order on September 30 (A.39-40). Even then the Director's approval was conditioned upon his subordinates obtaining the Justice Department's agreement that the arrest would take place at the scene (A.42). The *Romano* order was not issued by September 30th, the date Borders had promised, and the FBI had less, not more, evidence of the judge's involvement when the arrest was made.

Those materials also disclosed that a meeting took place three days before the arrest at which subordinate FBI officials and Justice Department attorneys involved in the investigation discussed the prospects for forcing reassignment of an important case pending before Judge Hastings. The Department's attorneys reportedly decided that that would not be feasible under the circumstances known at that date (A.43). This disclosure raises new and troubling issues concerning the "leaks" of information to the media that immediately followed the arrest, issues that must now be explored in some depth.

At a minimum, these materials shed new light on the credibility of agent Murphy's and Reid Weingarten's prior testimony. Their presence in these files should suffice to illustrate the need for a careful review of all materials in the FBI files on Operation Apple Eye.

Terence J Anderson

Terence J. Anderson

Principal Counsel to
United States District Judge Alcee L. Hastings

May 19, 1989

APPENDIX TO

A STATEMENT CONCERNING
JUDGE HASTINGS'S NEED FOR TIME AND FUNDS TO DO NOW WHAT THE HOUSE SHOULD HAVE DONE BEFORE IMPEACHMENT:
THREE ILLUSTRATIONS WITH SUPPORTING DOCUMENTS

Confidential & Privileged
Attorney Work Product

Received as
Exhibit - 5/10/89

May 1, 1981

To: File

FR: TJA

Re: FBI Files Produced By the House of Representatives

I received four boxes of materials on Wednesday, April 26, 1989. One of these boxes contained four folders - - 1. "Hastings/Borders References Contained in Joseph Nesline's Files" (about 1000 pages); 2. Discovery Materials (which included depositions taken by Special Counsel (about 1000 pages with exhibits), a slim file containing DOJ materials (about 10 pages), and a Brady memo (2 pages); 3. FBI Wiretap (the Mayor Clark Disclosure Materials) (about 1000 pages); and 4. Borders - Gov't Exhibits (about 100 pages). The materials in folders 1 and 2 were examined and partially abstracted on Saturday, April 29, 1989. (See separate memorandum).

The remaining three boxes contained redacted files from FBI investigations related to Judge Hastings over the years. These materials appear to include files from FBI headquarters (HQ) and from the Washington (WF) and Miami (MM) field offices. For each investigation, the first two digits appear to be assigned from HQ and to be employed in all field office files. The remaining digits differ from office to office. A preliminary inventory is attached.

Based upon a rough estimate, the three boxes of FBI materials submitted amount to an estimated 16,000 pages. Excluding categories that appear only marginally relevant, approximately 12,000-13,000 pages will have to be examined with care. The FBI materials supplied from the FBI Nesline Materials are new. Those concerning Mayor Clark overlap to a significant extent with materials previously examined. Nonetheless, a careful review will be required to reconstruct the FBI internal decision record. In the aggregate the production of these materials will require a careful review of more than 14,000 pages.

Preliminary Inventory
FBI Files Received From House

Headquarters Files

HQ 58-10762: Operation Apple Eye

These files consist of two volumes. Estimated at 1000 pages.

HQ 62-120955: Request for Investigative Assistance by Chief Judge John C. Godbold, Eleventh Judicial Circuit, concerning U.S. District Judge Alcee L. Hastings

The files consist of twelve volumes - - eight sequential volumes and four "EBF" volumes. Estimated at 4000 pages.

HQ 77-137744: [FBI Background Investigation]

One volume was supplied. It probably amounts to 400 pages.

HQ - Reference Packs

There are four reference packs, apparently containing references to Judge Hastings culled from other HQ files. These probably amount to 600 pages.

HQ/MM - [Political Investigation Files]

This is a poorly copied, poorly organized collection of materials concerning the possibility of racial or political disturbances in Miami/Ft. Lauderdale in 1969. ALH is identified as a black community leader. About 200 pages.

Miami Files

MM 58-623: Operation Apple Eye

There are twenty volumes in all -- three volumes of main files; five volumes bearing designation MM58-623-1A; and thirteen volumes of subfiles. There are probably 2500 pages.

MM 62A-7251: Request for Investigative Assistance by Chief Judge John C. Godbold, Eleventh Judicial Circuit, concerning U.S. District Judge Alcee L. Hastings

There are six volumes -- four main volumes and two subvolumes bearing designation MM 62A-7251-1A. There are probably 1500 pages.

MM77-9409: [ALH: 1979 Background Investigation]

One volume, about 300 pages.

MM9A-3709: Committee of Vigilance, etc.

There are four volumes -- two main and two with additional suffix "1A". They deal with a radical political group that sends threatening messages to or concerning political figures. ALH is in good company. About 1000 pages.

MM [No. Redacted]: Wiretap Investigation

These are progress reports etc. covering period 6/20/85 to 8/16/85 concerning ILU/Gordon investigation. Totally redacted. About 10 pages.

MM72-219: Unknown Subj: Obstr. of Justice

An investigation of possible jury interference in U.S. v. Aboudando, a case tried before ALH in 1984. The investigation came to nothing, and ALH was not a suspect. About 10 pages.

MM47-62941 Unknown Subj.: Impersonation of ALH (Zenda Clark)

In early October 1982, Zenda Clark of New Jersey called ALH to advise him that a man had been posing as him. On October 5, 1982, ALH reported this to FBI Miami. The sporadic impersonation lasted from September 5 through October 5, 1981. There was a final call from unknown suspect to Clark on October 7. File reflects investigation of ALH trip to Newark on 10/22/82 to conduct his own investigation. About 25 pages.

MM157-4386-3: [No title]

Only a single illegible newspaper clipping supplied. Two pages.

Washington Files (Field Office)

WF58-1899: Operation Apple Eye

The Washington Field Office files consist of five main volumes and sixteen volumes of sub files that appear to be incomplete -- e.g., there is no volume for WQF58-1899-sub A, although there is a sub C, etc. Approximately 2500 pages supplied.

WF62-1104: Request for Investigative Assistance by Chief Judge John C. Godbold . . . etc.

This is the companion to the HQ and Miami files. Three volumes, two main and one sub files, have been submitted. The sub file is WF62A-1104 Sub C suggesting that some volumes have been omitted. About 500 pages.

WF9-5302: Committee on Vigilance, etc.

The companion political threats file in two volumes; about 500 pages.

WF77-107125: [ALH - 1979 Background Investigation]

About 40 pages concerning ALH time in D.C. and at Howard.

WFO - References

Miscellaneous references from other files. About 25 pages. This includes additional materials on Nesline/Dredge.

FD-302 (REV. 3-10-82)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 10/20/85

Special Agent (SA) KENDALL W. SHULL advised that JOE NESLINE gave him the following explanation of his (NESLINE's) involvement in the investigation of Federal Judge HASTINGS and a black attorney from Washington, D. C., named WILLIAM BORDERS:

NESLINE told SA SHULL that a friend of his had gotten in trouble over a narcotics charge and asked him to recommend an attorney to defend him. NESLINE introduced his friend to a black attorney from Washington, D. C. The black attorney told NESLINE's friend that he would charge him $2,500 to defend him in the drug charge. NESLINE's friend hired the black attorney and as far as NESLINE was concerned at that time that was the end of the matter, because he did not hear from his friend for several weeks.

NESLINE stated that one Saturday, several weeks later, his friend called him on the telephone and arranged to visit NESLINE at his home at the PROMENADE on Fuchs Hill Road, Bethesda, Maryland, on a Sunday. NESLINE stated that while he was waiting for his friend to return, he read a newspaper article in the Sunday paper, which stated that his friend was, in fact, an informant for the government in a case in Florida. NESLINE stated that the case involved the Federal Judge HASTINGS.

NESLINE stated that his wife, BECKY, and his friend's wife went shopping while he and his friend stayed in the apartment. NESLINE stated that he had to hide the story in the newspaper from his friend. NESLINE said that he thought his friend was wired up and he was very uncomfortable during the visit, which lasted three to four hours.

Several months later, NESLINE stated that he and his wife stayed with MOKIE (AL FACINTO) who had a home on Rock Creek Parkway in Washington, D. C. During this stay with MOKIE, NESLINE said that his friend, who he suspected being a government informant, visited them again. The friend told NESLINE that he was indicted and was going to Baltimore, Maryland, for a hearing. The friend

Investigation on 10/20/85 at Amsterdam, Holland File # Washington Fiel 183A-1060 Sub I

CMST 11

by SA CHARLES H. BYRD, II CHB:mve Date dictated 10/20/85

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

returned after going to Baltimore, Maryland, and told NESLINE that he had pled guilty and had gotten six months probation. NESLINE said this confirmed to him that his friend was an informant. NESLINE stated that he understands that his friend is currently in the Witness Security Program.

NESLINE told SA SHULL that three "dagos" had some kind of a case in front of Federal Judge HASTINGS, a black judge in Florida. He said that his friend, who he introduced to the black attorney from Washington, D. C., had told these three individuals that "he had a black judge in my pocket." This friend of NESLINE's told the black attorney, who was identified by NESLINE as WILLIAM BORDERS, that "I know three dagos with a problem in front of Judge HASTINGS." According to NESLINE, BORDERS told his friend that for a price they could fix the case. NESLINE stated to SA SHULL that he did not believe that WILLIAM BORDERS had any control or influence over Judge HASTINGS, although NESLINE stated that he (NESLINE) personally knew the judge he thought BORDERS was scamming his friend.

NESLINE told SA SHULL that his knowledge came from the papers and that he did not know any of this first hand.

NESLINE told SA SHULL that PETE CHACONAS had told him that SA SHULL was a FEDERAL BUREAU OF INVESTIGATION (FBI) Agent. NESLINE said that this occurred with SA SHULL and NESLINE started meeting together at the METRO MARKET at 18th and I Streets, N. W., Washington, D. C. NESLINE told SA SHULL, however, that CHACONAS was lying in an effort to ingratiate himself with NESLINE.

FD-36 (Rev. 8-26-84)

FBI 242

TRANSMIT VIA:
☒ Teletype
☐ Facsimile
☐ ______________

PRECEDENCE:
☐ Immediate
☐ Priority
☒ Routine

CLASSIFICATION:
☐ TOP SECRET
☐ SECRET
☐ CONFIDENTIAL
☐ UNCLAS E F T O
☒ UNCLAS
Date 11/5/85

6037

FROM: SAC, WASHINGTON FIELD OFFICE (183A-1060) (P) (C-6)

TO: DIRECTOR, FBI 128

ATTN: ORGANIZED CRIME SECTION, SSA WALT SCHEUPLEIN

WHITE COLLAR CRIME SECTION, SSA DENNIS AIKEN

BT

UNCLAS

VIDGAM; OO:WFO

RE TEL CALL OF SSA KIRBY H. MAJOR TO SSA'S SCHEUPLEIN AND AIKEN 11/1/85.

PER REFERENCED TELEPHONE CALLS, FBIHQ ADVISED THAT DISCUSSIONS WITH JOHN ROHR, COUNSEL TO THE THREE JUDGE PANEL SITTING IN ATLANTA, GEORGIA, DETERMINED THAT ROHR DID NOT WANT UCA IN CAPTIONED MATTER TO TAKE ANY FURTHER ACTION RELATIVE TO JOSEPH NESLINE'S ASSOCIATION/RELATIONSHIP WITH THE BORDERS/HASTINGS MATTER. FURTHER, DURING RE TEL CALLS, IT WAS DETERMINED THAT THE INFORMATION PROVIDED UCA BY NESLINE WOULD

✓

2-WFO

KHM:rkg
(2)

183-1066-64

9

Approved: ______ Transmitted ______ (Number) (Time) Per ______

37 Oct 85 17 18

NOV 6 1985

Byrd

FD-36 (Rev. 8-26-82)

FBI

243

TRANSMIT VIA:
☐ Teletype
☐ Facsimile
☐ ________

PRECEDENCE:
☐ Immediate
☐ Priority
☐ Routine

CLASSIFICATION:
☐ TOP SECRET
☐ SECRET
☐ CONFIDENTIAL
☐ UNCLAS E F T O
☐ UNCLAS
Date ________

PAGE TWO DE WF 0037 UNCLAS

NOT RESULT IN A PERJURY OR OBSTRUCTION CASE RELATIVE TO THE PREVIOUS TRIAL OF U.S. DISTRICT COURT JUDGE ALCEE HASTINGS.

BASED ON THE ABOVE, WFO WILL INITIATE EFFORTS TO CLOSE ABOVE GROUP 1 EFFORT.

BT

0037

NNNN

Approved: ________ Transmitted ________ (Number) (Time) Per ________

FD-36 (Rev. 8-29-82)

FBI 244

#769689
771515

TRANSMIT VIA:
☒ Teletype
☐ Facsimile
☐ ______

PRECEDENCE:
☐ Immediate
☒ Priority
☐ Routine

CLASSIFICATION:
☐ TOP SECRET
☐ SECRET
☐ CONFIDENTIAL
☒ UNCLAS E F T O
☐ UNCLAS
Date 3/3/86

FM MIAMI (195A-22) (P) (PC-1)

DIRECTOR PRIORITY (ATTN: WALTER SCHEUPLEIN, OC, SECTION)

(HAND CARRY SEALED ENVELOPE)

BT

UNCLAS E F T O

INTERNATIONAL LONGSHOREMENS ASSOCIATION (ILA); LOCALS 1416 AND 1922, HOBBS ACT-LABOR, LMRDA; LMRA; OO: MM.

REFERENCE MIAMI TELETYPE TO THE BUREAU DATED FEBRUARY 28, 1986 CAPTIONED KEVIN "WAXY" GORDON, ETAL, RICO-CPO; OO:MM, AND TELCALL TO THE BUREAU AND MIAMI DATED FEBRUARY 28, 29, 1986, AND MARCH 1, 1986.

PER YOUR REQUEST, THE FOLLOWING IS BEING SUBMITTED TO DOCUMENT MIAMI'S REQUEST FOR BUREAU AUTHORIZATION TO CONSENSUALLY RECORD TELEPHONE AND ORAL CONVERSATIONS BETWEEN STEPHEN P. CLARK, MAYOR, DADE COUNTY FLORIDA, AND ALCEE HASTINGS, FEDERAL DISTRICT COURT JUDGE, SOUTHERN DISTRICT OF FLORIDA.

AS THE BUREAU IS AWARE, CLARK WAS INTERVIEWED ON FEBRUARY 28,

① - 195A-22
CES/VMD
(1)

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1986, BY FBI AGENTS IN MIAMI AND STATED HASTINGS TOLD HIM TO "STAY AWAY FROM KEVIN GORDON BECAUSE HE IS HOT". DURING THE COURSE OF THE INTERVIEW, CLARK STATED THAT HE KNEW THAT HE WAS IN THE MIDDLE OF THIS INVESTIGATION AND SAID "I GUESS I WILL HAVE TO WIRE UP". BASED UPON THIS REPRESENTATION BY CLARK AND ADDITIONAL FACTORS EMERGING FROM CLARK'S INTERVIEW, MIAMI INTENDS TO RECONTACT CLARK AND SEEK HIS CONSENT TO CONSENSUALLY MONITOR CONVERSATIONS BETWEEN HIMSELF AND HASTINGS IN THE EXPECTATION OF DOCUMENTING HASTINGS' ROLE IN LEAK OF TITLE III INFORMATION RELATIVE TO CAPTIONED INVESTIGATION. HOWEVER, MIAMI BELIEVES IT WOULD BE IN STRONGER POSITION TO SOLICIT CLARK'S COOPERATION IF IT ALREADY HAD BUREAU APPROVAL TO CONSENSUALLY MONITOR CONVERSATIONS.

MIAMI BELIEVES THAT IF CLARK AGREES TO CONSENSUAL MONITORINGS, TIME MAYBE OF THE ESSENCE TO PROCEED TO THE ANTICIPATED SCENARIO OUTLINED BELOW:

MIAMI CANNOT AT THIS TIME ELABORATE ON A PLAN OR SCENARIO WITHOUT FIRST RECONTACTING CLARK. HOWEVER, MIAMI ANTICIPATES THAT THE BEST SCENARIO WILL INVOLVE CLARK MEETING HASTINGS IN AND APPARENTLY ACCIDENTIAL SETTING SUCH AS AT DINNER, A COMMUNITY

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ORIENTED MEETING, OR IN A PUBLIC PLACE. THIS TYPE OF CHANCE ENCOUNTER WOULD MINIMIZE SUSPICISIONS HASTINGS MAY HAVE OF CLARK AND ENABLE CLARK TO ASSUME A MORE NATURAL ROLE AS A PUBLIC OFFICIAL. MIAMI WOULD INSTRUCT CLARK TO MERELY THANK HASTINGS FOR THE WARNING HE GAVE CLARK INASMUCH AS CLARK WOULD TELL HASTINGS THAT HE IN FACT LEARNED THAT THERE WAS A FBI INVESTIGATION OF GORDON. ANY ACKNOWLEDGEMENT BY HASTINGS WOULD CONFIRM CLARK'S POTENTIAL TESTIMONY AGAINST HASTINGS. OF-COURSE, IF THE OPPORTUNITY ARISES CLARK WOULD BE INSTRUCTED TO AUGMENT THE CONVERSATION TO INCLUDE OTHER SPECIFIC DETAILS OF THE HASTINGS LEAK.

IN ORDER TO CONTROL A CLARK/HASTINGS MEETING, MIAMI WILL ESTABLISH PERIODIC SURVEILLANCES OF HASTINGS. MIAMI IS FULLY AWARE OF THE PITFALLS IN PURSUING THE AFOREMENTIONED SCENARION. THERE IS A DISTINCT POSSIBILITY HASTINGS MAY LEARN OF THE FEBRUARY 28, 1986, FBI INTERVIEWS OF CLARK AND OTHER POTENTIAL SUBJECTS EITHER FROM THE SUBJECTS DIRECTLY OR THROUGH STREET TALK, AND THEREBY CLEAN HIMSELF IN ANY MONITORED CONVERSATIONS. HENCE, THE LONGER MIAMI DELAYS SETTING IN MOTION THE PROPOSED SCENARIO, THE

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MORE DIFFICULT IT WILL BECOME TO RESOLVE THIS MATTER SUCCESSFULLY. NOTING THE PITFALLS, MIAMI ALSO CONCURS IN THE USE OF POLYGRAPH EXAMINATION, HOWEVER, A POST MEETING EXAMINATION MAY NOT BE NECESSARY IF HASTINGS IN FACT INCRIMINATES HIMSELF.

ON THE OTHER HAND, MIAMI DOES NOT BELIEVE LOCKING CLARK INTO HIS TESTIMONY BY WAY OF GRAND JURY APPEARANCE PRIOR TO CONSENSUAL MONITORING HIS CONVERSATIONS IS NECESSARY FOR THE FOLLOWING REASONS:

1. CLARK'S PRESENCE AT ANY GRAND JURY INCREASES THE CHANCES OF LEAKS.

2. THE DEPARTMENT OF JUSTICE (DOJ) HAS ALREAD AUTHORIZED THE PROSECUTION OF CLARK UNDER TITLE 18, U.S.C., SECTION 1001. CLARK'S TESTIMONY BEFORE A FGJ COULD SIGNIFICANTLY IMPEDE PROSPECTS OF SUCH PROSECUTION THEREBY ELIMINATING A BARGAINING TOOL IN SEEKING CLARK'S COOPERATION.

3. CLARK IS, IN EFFECT, ALREADY LOCKED INTO HIS TESTIMONY THROUGH HIS OWN WORDS DULY RECORDED IN CONVERSATIONS WITH KEVIN GORDON. MIAMI HAS NO REASON TO BELIEVE THAT CLARK HAS ANY FURTHER KNOWLEDGE OF WHAT HASTINGS TOLD HIM OF THE INVESTIGATION THAT WE

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DO NOT ALREADY KNOW THROUGH CONSENSUAL RECORDED CONVERSATIONS BETWEEN KEVIN GORDON AND CLARK AND PETER FERGUSON.

4. DOJ IS OPPOSED TO COMMITING CLARK'S TESTIMONY TO FGJ RECORD AT THIS TIME BECAUSE AS MENTIONED EARLY IT COULD IMPEDE SECTION 1001 PROSECUTION. FURTHER, DOJ WANTS CLARK FULLY DEBRIEFED THROUGH MORE EXTENSIVE INTERVIEWS SO THAT FUTURE TRIAL TESTIMONY WILL NOT BE FLAWED OR CONTRACTED BY INCONSISTENCIES DERIVED FROM EARLY FGJ TESTIMONY.

MIAMI PLANS TO REINTERVIEW CLARK ON MONDAY, MARCH 3, 1986, AT WHICH TIME CLARK'S COOPERATION WILL BE SOLICITED. FOR THE INFORMATION OF THE BUREAU, DOJ CONCURS IN THE USE OF CONSENSUAL MONITORING OF CONVERSATIONS BETWEEN CLARK AND HASTINGS AND HAS INDICATED THAT THERE ARE NO ENTRAPMENT ISSUES. DOJ ALSO CONCURS IN SURVEILLANCES OF HASTINGS. PURSUANT TO TELEPHONE CONVERSATION BETWEEN SAC, MIAMI, AND ASSISTANT DIRECTOR FLOYD CLARKE, MIAMI WILL PROCEED WITH INTERVIEW OF MAYOR CLARK, ATTEMPT TO SOLICIT HIS COOPERATION, AND INSIST ON COMPLETE TRUTHFULNESS OF MAYOR CLARK ALONG WITH POLYGRAPH EXAMINATION PRIOR TO PLANNING ANY MEETING WITH HASTINGS. IF MIAMI IS SATISFIED WITH LEVEL OF COOPERATION

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ON PART OF MAYOR CLARK AND HE IS WILLING TO CONSENSUALLY MONITOR CONVERSATIONS WITH HASTINGS, PRIOR TELEPHONIC APPROVAL WILL BE SOUGHT FROM THE BUREAU BEFORE PROCEEDING FURTHER WITH CLARK/HASTINGS MEETING.

BUREAU WILL BE KEPT ADVISED OF FURTHER DEVELOPMENTS.

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FM MIAMI (58-623) (OC-2) P

TO DIRECTOR IMMEDIATE 11 35/10

ATTENTION: SEAN HILLY, CID

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SECTION 1 OF 2.

APPLE EYE; BRIBERY; 00:MIAMI.

RE MIAMI TELETYPES TO DIRECTOR, AUGUST 28, 1981 AND SEPTEMBER 2, 1981.

RELATING TO THE UCO PROPOSAL

I. PURPOSE

REQUEST FOR AUTHORITY FOR AN UNDERCOVER OPERATION (UCO), FOR 60 DAYS IN THE CORRUPTION OF PUBLIC OFFICIALS AND ORGANIZED CRIME AREAS TO BE CONDUCTED IN THE MIAMI DIVISION AT A TOTAL COST OF $30,000. UCO TO BE ENTITLED APPLE EYE.

II. OBJECTIVES OF OPERATION

SPECIFICALLY, THE OBJECTIVE OF THE UCO IS:

A. OBTAIN PROSECUTABLE EVIDENCE SHOWING THAT A NATIONALLY

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PROMINENT ATTORNEY IS ACTING AS THE MIDDLEMAN, BETWEEN A USDC JUDGE AND INDIVIDUALS COMING BEFORE THE JUDGE'S BENCH, CONDUCTING CRIMINAL ACTIVITIES INVOLVING THE SOLICITING OF BRIBES.

III. DETAILS

A. CRIMINAL PROBLEM

1. TYPE OF CRIME

A. BRIBERY AND SOLICITATION OF BRIBERY, TITLE 18, USC, SECTION 201, IS THE CRIME BEING COMMITTED. INFORMATION, TO DATE, INDICATES THAT THE ATTORNEY, AT THE REQUEST OF THE USDC JUDGE, IS APPROACHING INDIVIDUALS WHO ARE CRIMINALLY CHARGED AND SCHEDULED BEFORE THE JUDGE AND ADVISING THEM THAT IN EXCHANGE FOR A CASH PAYMENT THEIR CRIMINAL CHARGES WILL BE SUBSTANTIALLY REDUCED.

2. SUBJECTS

A. WILLIAM A. BORDERS, JR., DATE OF BIRTH MARCH 9, 1939, EMPLOYMENT - ATTORNEY, COBB, BORDERS AND WILLIAMS, WASHINGTON, D.C.; OTHER - PRESIDENT, NATIONAL BAR ASSOCIATION (1980), MEMBER OF FIVE-MAN PANEL OF ATTORNEYS WHO AID IN SELECTION OF USDC JUDGESHIPS.

B. ALCEE LAMAR HASTINGS, DATE OF BIRTH SEPTEMBER 5, 1936, EMPLOYMENT - USDC JUDGE, SOUTHERN DISTRICT OF FLORIDA, APPROXIMATELY [illegible]

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TWO YEARS.

C. SANTO TRAFFICANTE, DATE OF BIRTH NOVEMBER 15, 1914. OTHER - NUMBER ONE ORGANIZED CRIME FIGURE IN SOUTH FLORIDA AREA. CURRENTLY INDICTED AND SCHEDULED FOR TRIAL BEFORE JUDGE HASTINGS.

D. ANTHONY ACCARDO, DATE OF BIRTH APRIL 28, 1906.

E. ANTHONY PILLOTO, DATE OF BIRTH JANUARY 6, 1911.

B. PRIOR INVESTIGATION

A SOURCE, WHO HAS SUPPLIED RELIABLE INFORMATION TO ANOTHER FEDERAL AGENCY IN THE PAST, HAS SUPPLIED INFORMATION REGARDING THIS BRIBERY ALLEGATION. TO DATE, THE FOLLOWING ARE HIGHLIGHTS OF THE INVESTIGATION. (IT IS NOTED THAT DUE TO THE SENSITIVE NATURE OF THE INVESTIGATION, OVERT INVESTIGATION HAS BEEN LIMITED)

1. ON JULY 21, 1981, BORDERS MET WITH TRFFICANTE IN MIAMI. (HQ HAS DETAILS OF CLANDESTINE MEETING.)

2. ON AUGUST 21, 1981, BORDERS, AGAIN, MET WITH TRAFFICANTE

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IN MIAMI. (HQ HAS DETAILS.)

3. REVIEW OF TELEPHONE TOLL RECORDS FOR BORDERS AND JUDGE HASTINGS REVEALS THE FOLLOWING CALLS BETWEEN THEIR BUSINESS AND/OR RESIDENCES:

MAY 11, 1981, JUDGE TO BORDERS - ONE MINUTE; MAY 29, 1981, BORDERS TO JUDGE - ONE MINUTE; MAY 29, 1981, BORDERS TO JUDGE - ONE MINUTE; JULY 5, 1981, JUDGE TO BORDERS - ONE MINUTE; JULY 16, 1981, JUDGE TO BORDERS - ONE MINUTE; AUGUST 12, 1981, BORDERS TO JUDGE - ONE MINUTE.

4. SOURCE ADVISED THAT $100,000 OF $600,000 BRIBE WAS DELIVERED BY ONE OF TRAFFICANTE'S ASSOCIATES IN TAMPA, FLORIDA, TO BORDERS IN WASHINGTON, D.C., DURING THE WEEKEND OF AUGUST 29-30, 1981.

5. SOURCE ADVISED THAT BORDERS IS DOING SIMILAR DEALS INVOLVING AN UNKNOWN U.S. APPELLATE COURT JUDGE IN NEW ORLEANS.

TO DATE, INVESTIGATION HAS GATHERED EVIDENCE THAT IS CIRCUMSTANTIAL IN NATURE AND IT IS BELIEVED THAT THE ONLY WAY THAT HARD EVIDENCE CAN BE GATHERED FOR A SUCCESSFUL PROSECUTION IS BY THE USE OF A UCO SCENARIO WHERE CONVERSATIONS WITH BORDERS CAN BE TAPED AND THE SCENARIO ALLOWED TO RUN ITS COURSE.

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IV. UNDERCOVER OPERATION PROPOSAL

1. THE SOURCE OF THE INFORMATION IN CAPTIONED MATTER HAS AGREED TO MAKE AN INTRODUCTION OF A UCA TO BORDERS TO RUN A SCENARIO WHICH SHOULD PRODUCE THE EVIDENCE FOR A SUCCESSFUL PROSECUTION IN CAPTIONED MATTER. THIS IS THE REASON FOR THE USE OF THE UNDERCOVER TECHNIQUE.

2. THE UCA WILL PLAY THE ROLE OF FRANK OR THOMAS ROMANO. (THE ROMANO BROTHERS WERE RECENTLY CONVICTED AND SENTENCED BEFORE JUDGE HASTINGS IN USDC, MIAMI, FLORIDA, THREE YEARS CUSTODY OF ATTORNEY GENERAL AND FINES AND FORFEITURES TOTALING $1.3 MILLION DOLLARS.) HQ IS IN RECEIPT OF INFORMATION AS TO WHY THE INTRODUCTION OF THE UCA BY THE SOURCE WILL BE ACCEPTABLE TO BORDERS. IT IS BELIEVED THAT THE INITIAL AND SUBSEQUENT MEETINGS WITH BORDERS CAN BE RECORDED AND THAT THE FOLLOWING WILL BE OBTAINED:

1. DETAILS OF THE "FIX", I.E., PRICE, MOTIONS TO BE FILED, TIMING, ETC.

2. SHOW OF PROOF BY JUDGE HASTINGS THAT BORDERS IS ACTING IN THE JUDGE'S BEHALF (RESTAURANT SCENARIO OR OTHER).

3. EXCHANGE OF FRONT MONEY.

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3. AN UNDERCOVER AGENT (RETIRED SA OF MIAMI DIVISION) WILL BE INTRODUCED DUE TO THE AGES OF THE ROMANO BROTHERS. THE UCA WILL BE INTRODUCED BY THE SOURCE WHO WILL THEN LEAVE THE MEETING. THE SOURCE HAS ADVISED THAT HE WILL NOT TESTIFY IN CAPTIONED MATTER.

4. LENGTH OF OPERATION

THE PROPOSED LENGTH OF THE OPERATION IS 60 DAYS DUE TO THE CONSTRAINTS KNOWN TO HQ.

5. COST

A. UP-FRONT MONEY WILL BE IN THE AMOUNT OF $25,000.

B. MISCELLANEOUS EXPENSES HAVE BEEN ESTIMATED AT $5,000.

C. TOTAL COST $30,000.

6. MANPOWER WILL BE SUPPLIED BY THE MIAMI DIVISION AND THE UTILIZATION OF ONE FORMER BUREAU SA.

V. TECHNICAL EQUIPMENT

NAGRA BODY RECORDING EQUIPMENT WILL BE NEEDED AT THIS POINT IN TIME. IT APPEARS THAT MIAMI DIVISION HAS SUFFICIENT EQUIPMENT.

IV. PLA ANALYSIS

MIAMI PLA HAS REVIEWED PROPOSAL AND IS OF THE OPINION THERE IS NO ENTRAPMENT OR DUE PROCESS PROBLEMS WITH PROPOSED PROJECT.

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TO DIRECTOR IMMEDIATE // 50

ATTENTION: SEAN HILLY, CID

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SECTION 2 OF 2.

APPLE EYE; BRIBERY; OO:MIAMI.

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NOR IS THERE ANY LEGAL PROBLEM WITH HAVING FORMER SA REPRESENT A LIVING PERSON. IT IS RECOMMENDED THAT A PERSONAL SERVICES AGREEMENT BE EXECUTED BETWEEN THE FBI AND FORMER SA SPELLING OUT HIS AUTHORITY AS WELL AS AN INDEMNITY CLAUSE WHICH WOULD INDEMNIFY HIM AGAINST CIVIL SUITS THAT MIGHT ARISE OUT OF THIS PROJECT.

VII. DEPARTMENTAL ATTORNEY OPINION

REID WEINGARTEN, ATTORNEY, PROFESSIONAL INTEGRITY SECTION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C., HAS BEEN APPRISED OF THE DEVELOPMENTS IN CAPTIONED INVESTIGATION SINCE ITS INCEPTION. HE CONCURS WITH THE PROPOSAL AND ITS OBJECTIVES AND LEGALITY. HE IS DEDICATED TO THE PROSECUTION OF THE SUBJECTS DEVELOPED. HE ADVISED THAT THE USE OF THE UCO SCENARIO WILL NOT BE CONSTRUED AS ENTRAPMENT.

VIII. EXEMPTIONS

AN EXEMPTION FOR DEPOSITING APPROPRIATED FUNDS WILL BE NEEDED.

IX. COOPERATIVE ASSET

THE COOPERATING ASSET IN CAPTIONED MATTER HAS A CRIMINAL HISTORY DATING TO 1943. THE ASSET IS 53 YEARS OLD. THE ASSET HAS DEALT WITH BORDERS FOR A NUMBER OF YEARS AND HAS HIS CONFIDENCE.

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ATLEE WAMPLER, USA, MIAMI, FLORIDA, IS IN POSSESSION OF STATISTICAL INFORMATION WHICH OUTLINES THE ASSET'S ACCOMPLISHMENTS AND WHICH WOULD RATE THE ASSET AS EXCELLENT TO OUTSTANDING.

THE ASSET BY HIS ACTIONS HAS DEMONSTRATED HIS STABILITY. HE HAS ADVISED THAT HE WILL NEVER TESTIFY IN THIS OR ANY OTHER MATTER. HE STATED THAT IN EXCHANGE FOR HIS BEING ALLOWED TO PLEAD GUILTY TO ONE FELONY COUNT (NARCOTICS CONSPIRACY) OF AN EIGHT-COUNT INDICTMENT CURRENTLY PENDING AGAINST HIM IN BALTIMORE, MARYLAND, AND THE GOVERNMENT STANDING MUTE AT HIS SENTENCING. (WITH HIS COOPERATION AND ACTIONS BEING MADE KNOWN TO THE SENTENCING JUDGE, IN CAMERA) THAT HE WOULD CONTINUE TO COOPERATE WITH THE GOVERNMENT IN CAPTIONED MATTER AND WOULD INTRODUCE A UCA TO WILLIAM BORDERS TO RUN THE ROMANO BROTHERS' SCENARIO.

X. SAC COMMENTS

SAC, MIAMI, IS COMMITTED TO THE USE OF THE UNDERCOVER TECHNIQUE IN THIS MATTER AND WILL SUPPLY THE NECESSARY MANPOWER AND EQUIPMENT FOR THE OPERATION.

ADMINISTRATIVE

ON SEPTEMBER 2, 1981, REID WEINGARTEN, PIS, DOJ, WASHINGTON,DC, [illegible]

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ADVISED THAT HIS SUPERIORS HAVE ADVISED THAT IF WILLIAM DREDGE IS WILLING TO PLEAD TO ONE FELONY COUNT (NARCOTICS CONSPIRACY) OF HIS EIGHT-COUNT INDICTMENT IN BALTIMORE AND CONTINUE TO COOPERATE WITH THE GOVERNMENT IN CAPTIONED MATTER WITH AN INTRODUCTION OF A UCA TO WILLIAM BORDERS IN THE ROMANO BROTHERS' SCENARIO THAT THE USA, BALTIMORE, WOULD ACCEPT HIS PLEA AND WOULD NOT REQUIRE HIS C COOPERATION IN THAT MATTER AND WOULD STAND MUTE AT SENTENCING. IN ADDITION, THE GOVERNMENT WOULD ADVISE THE SENTENCING JUDGE OF DREDGE'S COOPERATION AND ACTIONS IN CAPTIONED MATTER.

ON SEPTEMBER 3, 1981, SA WILLIAM J. MURPHY, JR. MET WITH WILLIAM DREDGE AT WHICH TIME DREDGE AGREED TO THE ABOVE AGREEMENT. NO PROMISES, THREATS OR COERCION WERE EMPLOYED AND DREDGE ADVISED THAT THE FINAL SENTENCING WAS AT THE DISCRETION OF THE JUDGE.

ON SEPTEMBER 3, 1981, WITHIN MINUTES OF SA MURPHY'S DEPARTURE FROM DREDGE, DREDGE TELEPHONICALLY CONTACTED SA MURPHY AND ADVISED THAT HE HAD JUST BEEN CONTACTED BY HIS BALTIMORE ATTORNEY, ROGER SPADER. HE STATED THAT SPADER RELATED THAT AUSA STEVE ALLEN, USA'S OFFICE, BALTIMORE, HAD JUST CONTACTED HIM (SPADER) AND ADVISED THAT HE WAS SEEKING DOJ APPROVAL TO FILE A DANGEROUS OFFENDER

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AFFIDAVIT REGARDING DREDGE TO BE READ BY THE JUDGE UPON DREDGE'S SENTENCING. SPADER ADVISED DREDGE THAT IF THE JUDGE ACCEPTS THIS THAT IT CARRIES AN AUTOMATIC 20-25 YEAR SENTENCE. (IT IS NOTED THAT CASE AGENT IS NOT FAMILIAR WITH THIS PROPOSAL BUT UNDERSTANDS THAT IT IS FILED AT TIMES REGARDING NARCOTICS VIOLATORS). DREDGE WAS IRATE AND FELT THAT THE GOVERNMENT HAD THROWN HIM A "CURVE BALL." HE ADVISED THAT THE AGREEMENT WAS OFF BECAUSE HE DID NOT FEEL THAT HE COULD LOGICALLY REQUEST HIS ATTORNEY TO SEEK A PLEA AGREEMENT (KEEPING IN MIND THAT DREDGE HAS STATED THAT HE DID NOT WANT SPADER TO KNOW OF HIS COOPERATION FOR PERSONAL SAFETY REASONS) BECAUSE IT WOULD NOT APPEAR, WITH THIS NEW DEVELOPMENT, THAT AUSA ALLEN WOULD ACCEPT ONE.

DREDGE ADVISED THAT HE WOULD ONLY AGREE AT THIS POINT IF AUSA ALLEN MADE THE PLEA AGREEMENT PROPOSAL TO SPADER AND THAT, IN ADDITION, HIS VEHICLE, WHICH WAS SEIZED IN THE BALTIMORE CASE, WAS ORDERED RETURNED TO HIM AS A SHOW OF GOOD FAITH ON THE GOVERNMENT'S PART.

ON SEPTEMBER 2, 1981, REID WEINGARTEN ADVISED THAT AUSA ALLEN'S MOTIVE FOR HIS CONTACT WITH SPADER WAS TO PRESSURE DREDGE TO ACCEPT

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PAGE ELEVEN MM (58-623) UNCLAS

THE AGREEMENT. HE DID NOT ADVISE WHY ALLEN DID NOT CONTACT HIM BEFORE DOING WHAT HE DID.

ON SEPTEMBER 3, 1981, WILLIAM DREDGE ADVISED THAT HE WAS TRAVELING TO WASHINGTON, D.C., ON SEPTEMBER 4, 1981, TO MEET WITH HIS ATTORNEY AND WOULD RETURN TO THE MIAMI AREA ON SEPTEMBER 8, 1981

IT IS REQUESTED OF THE BUREAU THAT AUTHORITY BE OBTAINED FROM THE APPROPRIATE DOJ PERSONNEL FOR THE UCA IN CAPTIONED MATTER TO RECORD ANY AND ALL CONVERSATIONS WITH WILLIAM BORDERS AND OTHERS IN CAPTIONED MATTER. HQ SHOULD HAVE SUFFICIENT INFORMATION TO MAKE THIS REQUEST.

MIAMI, AT MIAMI:

1. WILL UPON DETERMINING THE IDENTITY OF A SUITABLE UCA (FORMER FBI SA), SUBMIT VIA TELETYPE A COPY OF A PERSONAL SERVICES CONTRACT EXECUTED BY SAME.

2. INVESTIGATION CONTINUING.

BT

Approved: ______________ Transmitted ______________ (Number) (Time) Per ______________

262

Memorandum

Exec AD Adm. ___
Exec AD Inv. ___
Exec AD LES ___
Asst. Dir.:
  Adm. Servs. ___
  Crim. Inv. ___
  Ident. ___
  Insp. ___
  Intell. ___
  Lab. ___
  Legal Coun. ___
  Off. Cong. & Public Affs. ___
  Rec. Mgnt. ___
  Tech. Servs. ___
  Training ___
Telephone Rm. ___
Director's Sec'y ___

To Mr. Monroe

Date 9/3/81

From S.M. McWeeney

903

Subject: APPLE EYE
BRIBERY

PURPOSE: To recommend that this undercover operation be approved for sixty days with a budget of $30,000.

SYNOPSIS: William Borders, a Washington, D.C., attorney is attempting through United States District Court Judge Alcee Hastings to fix two cases that are before Judge Hastings. One of these cases is the Laborers International Union case wherein Santo Trafficante, LCN boss, Tampa, Florida; Anthony Accardo, consigliere, Chicago LCN; and 13 others are involved, and the other one is the Romano Brothers case wherein they were sentenced by Judge Hastings on 7/8/81 to three years in custody of the Attorney General and fined in excess of one million dollars. Surveillances of Borders have put him and Trafficante together on 7/21 and 8/21/81 at the Fontainbleau Hotel, Miami Beach, Florida. William Dredge, who advised both the FBI and United States Attorney's Office concerning the facts of this case, is willing to introduce two undercover Agents (UCAs) as the Romano brothers to Borders. Attached Miami teletype sets out scenario to be used in this case. Former FBI Agents will be used as undercover operatives.

RECOMMENDATION: That this undercover operation be approved for a sixty day period with a budget of $30,000.

ENCL Detached & Handled Separately 10/26/81 SMV

APPROVED:
Director ___
Exec. AD-Adm. ___
Exec. AD-Inv. ___
Exec. AD-LES ___
Adm. Servs. ___
Crim. Inv. ___
Ident. ___
Inspection ___
Intell. ___
Laboratory ___
Legal Coun. ___
Off. of Cong. & Public Affs. ___
Rec. Mgnt. ___
Tech. Servs. ___
Training ___

58-10762-12X

1 - Mr. Steel
1 - Mr. Mintz
(Attn: Mr. Collingwood)
1 - Mr. Revell
(Attn: Mr. Copeland)
2 - Mr. Bayse
(Attn: Mr. Knapp)
(Attn: Mr. R. Witzel)
1 - Mr. Monroe
1 - Mr. Castonguay

1 - Mr. Caro
1 - Mr. Gilbert
1 - Mr. Helterhoff [redacted]
1 - Mr. McWeeney
1 - Mr. Boland
1 - Mr. Langford OCT 20
1 - Mr. Hilly
1 - Mr. McDowell([redacted]
1 - Mr. Graham (DOJ)
1 - Mr. McGuire (DOJ)

SPM:jrg (17)

SEE CUORC ADDENDUM -Page 4 CONTINUED - OVER

SEE ADDENDUM DAD CARO - PAGE 5

43

61 NOV 24 1981

Memo McWeeney to Monroe
Re: AppleEye

DETAILS: On 6/3/81, Santo Trafficante, LCN boss, Tampa, Florida; Anthony Accardo, consigliere, Chicago LCN family; and 13 others were indicted on one count of RICO and Conspiracy regarding setting up an insurance company to provide coverage to the rank and file of LIUNA which necessitated payoffs and kickbacks to the LIUNA officials, to the LCN members, and to the various consultants and administrators of LIUNA funds.

On 7/20/81, William C. Dredge, currently under indictment in Baltimore, Maryland, for narcotics violation, contacted the United States Attorney's (USA) Office, Miami, Florida, requesting to speak to the Assistant United States Attorney (AUSA) handling the Trafficante case. Dredge told the AUSA that while in Washington, D.C., from 7/9-11/81, he spent several nights at the residence of a gambler friend, whom he would not identify, wherein he met Trafficante. Dredge stated that on 7/18/81 Dredge was in the company of United States District Court Judge Hastings, Miami, Florida, and Washington, D.C., attorney in Washington, D.C., whom he later identified as William Borders. Dredge stated that Trafficante was going to pay Judge Hastings one million dollars through Borders to have his (Trafficante's) case fixed. Dredge requested that the USA, Baltimore, Maryland, drop the charges against him before he would give any additional information. Dredge refused to talk with Miami FBI on 7/20 and 7/21/81.

On 7/21/81, Miami instituted surveillances on Dredge and Borders, whom Miami determined was to arrive at Miami, Florida, at 4:05 p.m., on 7/21/81 aboard Eastern Airlines Flight 965. At 7:15 p.m., both men observed leaving Dredge's residence and proceed to a Miami shopping center where Borders entered a taxi and proceeded to the Fontainbleau Hotel, Miami Beach. Borders met Trafficante at the hotel. The meeting was brief, and Trafficante drove Borders to the airport to catch a return flight at 9:30 p.m. At the airport, Trafficante was overheard to say, "you did a good job."

On 7/23/81, Dredge was interviewed by the Miami office. Dredge stated that there were previous meetings in Washington, D.C., and Miami between Borders and Trafficante as well as between Judge Hastings and Borders regarding the payoff to Judge Hastings. The first time was on 7/9 and 10/81 wherein Trafficante stayed at the residence of a mutual friend. Then on 7/18/81, a meeting was held in Washington, D.C., between Judge Hastings and Borders re this bribe. Finally, as pointed out in previous paragraph, Borders met Trafficante at the Fontainbleau Hotel on 7/21/81.

Dredge further advised that Borders, several months ago, contacted him and told Dredge to contact Frank and Thomas Romano (Genovese LCN "family" associates) and that Borders could fix their case before Judge Hastings for $150,000. Dredge never contacted them and the Romanos were sentenced on 7/8/81 to three years in prison and forfeited 1.2 million dollars. The Romano case is an FBI case wherein they were convicted in the United States District Court on 12/23/80 for violation of RICO, Conspiracy, Mail and Wire Fraud, as well as misappropriation of union funds and IRS violations.

Memo McWeeney to Monroe
Re: AppleEye

On 8/21/81, Borders traveled from Washington, D.C., area to Miami, Florida, via Eastern Airlines Flight 197, departed 5:30 p.m. and arrived 8:04 p.m. Surveillance coverage supplied by WFO. Female Special Agent, WFO, determined through conversations with Borders on airplane, that Borders planned to remain in Miami area only for scheduled meeting with someone and would attempt to depart for Atlanta, Georgia, same evening.

On 8/21/81, Borders surveilled by Miami Division upon arrival. Borders departed Miami International Airport via taxicab and proceeded directly to Fontainbleau Hotel, Miami Beach, Florida. Borders was met on lobby steps of hotel by Santo Trafficante and both entered vehicle registered to Trafficante's wife. Trafficante and Borders then drove directly to Miami International Airport. Both were observed conversing outside of Delta Airlines section of terminal for approximately ten minutes. Trafficante then departed in his vehicle and Borders proceeded to Delta ticket counter.

Trafficante proceeded to Vincent Capra's Italian Restaurant, 85th and Biscayne Boulevard, Miami, Florida, where he met with an individual who later departed area driving vehicle registered to Ben Husick. Husick is known associate of Trafficante.

Toll records for Dredge, Borders, Trafficante and his associates have been subpoenaed. Records show contact between Borders and Judge Hastings.

Dredge refuses to testify and is unwilling to wear a wire. However, Dredge is willing to introduce a UCA to Borders re the Romano Brothers.

Attached is Miami teletype setting out undercover operation scenario.

ADDENDUM: CRIMINAL UNDERCOVER OPERATIONS REVIEW COMMITTEE (CUORC)
PMM:med 9/10/81

On 9/8/81, the CUORC, with a representative of the Legal Counsel Division and representative(s) of the Department of Justice present, has determined that (1) the proposed undercover operation APPLE EYE, is necessary for the detection and prosecution of crimes against the United States; (2) that no extraordinary risk of injury, loss of property, or civil liability is anticipated during the conduct of the undercover operation.

The CUORC recommended that APPLE EYE, targeted against Borders, be approved for sixty days and funded in the amount of $30,000. Any planned meeting between the UCA and USDJ Hastings must obtain the approval of the Director.

9/10/81
Date

Dana E. Caro

ADDENDUM: INSPECTOR-DEPUTY ASSISTANT DIRECTOR CRIMINAL INVESTIGATIVE DIVISION (CID) DEC:jam ... 9/11/81

On 9/10/81, the Director and Assistant Director Charles P. Monroe, CID, were briefed in detail on APPLE EYE by Inspector-Deputy Assistant Director Caro, CID. Purpose of briefing the Director was that, if contacts with Attorney Borders are successful, the investigation could ultimately lead to Judge Hastings, U.S. District Court of Miami.

The Director and Mr. Monroe concurred with the proposal, as it impacts on Borders, and instructed that their approval be obtained prior to any contact with Judge Hastings.

APPROVED:	Adm. Servs.	Laboratory ______
	Crim. Inv.	Legal Coun. ______
Director ______		Off. of Cong. & Public Affs. ______
Exec. AD-Adm. ______	Ident. ______	Rec. Mgnt. ______
Exec. AD-Inv. ______	Inspection ______	Tech. Servs. ______
Exec. AD-LES ______	Intell. ______	Training ______

6-147 (1-13-81)

CRIMINAL INVESTIGATIVE DIVISION

INFORMATIVE NOTE

Date 9/24/81

Re: APPLE EYE
BRIBERY

The attached Miami teletype reflects investigative steps to be taken to bring this matter to a logical conclusion:

1. Immediate installation of pen register equipment on William Borders' residence and business telephones. Miami and DOJ contemplated pen register coverage of Judge Hastings' residence and business telephones, however, after consultation with FBIHQ, it was decided not to institute pen register coverage until after Judge Hastings signs order in this matter.

2. When Judge Hastings signs the order to return property seized to the Romano Brothers by September 30, 1981, the Miami Office will obtain Title III orders for ELSUR coverage of Borders' telephones as well as for Judge Hastings' telephones.

3. UCA will make telephone calls to William Borders in an effort to get Borders to call Judge Hastings concerning the Romano Brothers' case. 9/29 - Case Agent [illegible] advised [illegible].

1 - Mr. Mullen
1 - Mr. Andrews
1 - Mr. Monroe
1 - Mr. Caro
1 - Mr. McWeeney
1 - Mr. Hilly

APPROVED:

Director ____
Exec. AD-Adm. ____
Exec. AD-Inv. ____
Exec. AD-LES ____
Adm. Servs. ____
Crim. Inv. CM
Ident. ____
Inspection ____
Intell. ____
Laboratory ____
Legal Coun. ____
Off. of Cong & Public A ____
Rec. Mgnt. ____
Tech. Servs ____
Training ____

9/25

SPH:mab
(7)

Note - Since Borders is only subject at present time, [illegible] is opposed to obtain [illegible] [illegible] without further consideration by [illegible]

48

Re: APPLE EYE
BRIBERY

4. On October 3, 1981, a final payment of $125,000 will be made to Borders at which time Borders will be arrested and interviewed.

5. Interview of Judge Hastings.

6. Presentation of the facts before a Federal Grand Jury.

It is noted that the above scenario is flexible and may be revised as the circumstances dictate. This matter being closely followed by OCS/CID.

9/23/81

RECEIVED

SB

SEP 23 1981 16:

SECTION

903

Exec. AD-Adm. ___
Exec. AD-Inv. ___
Exec. AD-LES ___
Asst. Dir.:
Adm. Servs. ___
Crim. Inv. ___
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Legal Coun. ___
Rec. Mgnt. ___
Tech. Servs. ___
Training ___

MM0005 2661902

OO HQ WF

DE MM

O 231902Z SEP 81

FM MIAMI (58-623) (OC-2) P

TO DIRECTOR IMMEDIATE

ATTENTION: SEAN HILLY, CID

WFO (58-1899) (C-6) IMMEDIATE

ATTENTION: SA DALE BYRD

BT

UNCLAS

APPLE EYE; BRIBERY, OO:MIAMI.

RE MIAMI TELETYPE TO BUREAU, SETPEMBER 20, 1981, AND MIAMI TELCALLS TO BUREAU AND WFO, SEPTEMBER 22, 1981.

REFERENCED TELETYPE CALLS WERE MADE TO DISCUSS THE MATTER OF INITIATING TITLE III, ELSUR COVEPAGE OF THE TELEPHONES OF WILLIAM A. BORDERS, JR., AT HIS RESIDENCE, 28 58TH STREET, NORTHEAST, WASHINGTON, D.C., AND PLACE OF BUSINESS, COBB, BORDERS AND WILLIAMS, P.C., 1621 NEW HAMPSHIRE AVENUE, NOPTHWEST, WASHINGTON, D.C.

ON SEPTEMBER 22, 1981, REID WEINGARTEN, PROFESSIONAL INTEGRITY SECTION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C., ADVISED THAT HE

58-10762-22X

Informative note attached

1- ENCLOSURE

OCT 8 1981

CALLED:

BUNDICK

SDB Time 1926Z

79 DEC 17 1981

-34- 50

FOUR ELSUR

CONCURRED IN THE USE OF THIS ELSUR COVERAGE AND THAT HE WOULD AID IN THE PREPARATION OF THE NECESSARY AFFIDAVIT AND APPLICATION. HE STATED THAT AS A NECESSARY PRELIMINARY STEP TO THE OBTAINING OF THE TITLE III ORDER THAT PEN REGISTERS SHOULD BE INSTALLED ON THE LINES IN QUESTION. HE STATED THAT HE WOULD ASSIST IN THE PREPARATION OF THE APPLICATION AND ORDER FOR THE INSTALLATION OF THE PEN REGISTERS.

ON SEPTEMBER 23, 1981, HE ADVISED THAT HE WAS SEEKING ELECTRONIC SURVEILLANCE COVERAGE BECAUSE OF THE FOLLOWING REASONS:

1. HE ADVISED THAT IN ADDITION TO THE TWO SHOWS OF PROOF BY JUDGE HASTINGS, (I.E., THE SEPTEMBER 16, 1981 DINNER AT THE FONTAINEBLEAU AND THE UNILATERAL ORDER BY THE JUDGE TO RETURN A SUBSTANTIAL PORTION OF THE PROPERTY TO THE ROMANO BROTHERS WITHIN TEN DAYS OF THE SEPTEMBER 19, 1981 PAYMENT TO WILLIAM BORDERS) THAT ADDITIONAL CORROBORATING EVIDENCE IS NEEDED FOR A STRONGER PROSECUTABLE CASE AGAINST JUDGE HASTINGS.

2. HE STATED THAT EVEN WITH THE SHOWS OF PROOF THE JUDGE COULD POSSIBLY JUSTIFY HIS ACTIONS AS BEING COINCIDENTAL AND/OR DISCRETIONARY.

3. HE STATED THAT THERE IS A NEED FOR THIS ELSUR COVERAGE

2 -35-
51

PAGE THREE MM (58-623) UNCLAS

BECAUSE THERE IS NO POSSIBILITY FOR DIRECT CONTACT BETWEEN THE JUDGE AND THE UCA.

HE ADVISED THAT HE WOULD BE SEEKING APPROVAL FOR PEN REGISTER AND ULTIMATELY ELSUR COVERAGE ON THE RESIDENCE AND BUSINESS TELEPHONES OF BORDERS AND THE RESIDENCE AND BUSINESS TELEPHONES OF JUDGE HASTINGS. HE STATED THAT DUE TO THE HIGHLY SENSITIVE NATURE OF THE INDIVIDUALS AND THEIR PROFESSIONS, EXTREME CARE SHOULD BE TAKEN REGARDING MINIMIZATION.

THE FOLLOWING IS A BRIEF CHRONOLOGICAL SCENARIO AS TO THE SHUTDOWN OF THE COVERT STAGE OF THE CAPTIONED MATTER:

1. INSTALLATION OF PEN REGISTER EQUIPMENT ON THE JUDGE AND ATTORNEY'S RESIDENCE AND BUSINESS TELEPHONES ASAP.

2. ISSUING OF THE ORDER TO RETURN PROPERTY SEIZED BY THE ROMANO BROTHERS BY SEPTEMBER 30, 1981.

3. ISSUING OF THE TITLE III ORDERS FOR ELSUR COVERAGE OF THE ABOVE TELEPHONES ASAP.

4. TELEPHONE CALLS FROM UCA TO BORDERS.

5. FINAL PAYMENT OF $125,000.00 TO BORDERS AT MIAMI INTERNATIONAL AIRPORT, OCTOBER 3, 1981, AT WHICH TIME BORDERS WILL BE

3
-36-
52

PAGE FOUR (58-623) UNCLAS

ARRESTED AND ATTEMPT MADE TO GAIN HIS COOPERATION IN CAPTIONED MATTER. DATE OF OCTOBER 3, 1981, CAN BE NEGOTIATED, UNDER SUITABLE PRETEXT, FOR REASONABLE EXTENSION OF TIME TO RAISE PAYOFF MONEY.

6. POSSIBLE INTERVIEW FO AND/OR FEDERAL GRAND JURY APPEARANCES OF JUDGE HASTINGS.

IT IS NOTED THAT THE ABOVE SCENARIO IS FLEXIBLE AND MAY BE REVISED AS THE CIRCUMSTANCES DICTATE.

IT IS REQUESTED OF THE BUREAU THAT THE ELSUR INDEX BE REVIEWED FOR JUDGE ALCEE LAMAR HASTINGS AND WILLIAM A. BORDERS, JR.

WFO, AT WASHINGTON, D.C.:

1. CONTACT REID WEINGARTEN, PIS, DOJ, REGARDING PREPARATION OF APPLICATION AND ORDER FOR PEN REGISTERS.

2. HAVE SOUND AGENTS DETERMINE IF NECESSARY EQUIPMENT IS AVAILABLE.

3. ON SEPTEMBER 23, 1981, SUBPOENAS WILL BE FACSIMILIED TO WFO TO BE EXPEDITIOUSLY SERVED ON THE C AND P TELCO REGARDING RECENT TOLL RECORDS AND TYPE OF TELEPHONE SERVICE AND EQUIPMENT FOR BORDERS' RESIDENCE AND BUSINESS.

MIAMI, AT MIAMI, INVESTIGATION CONTINUING.

BT

4-37-
53

10/2/81

DO-6

OFFICE OF DIRECTOR
FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE

Mr. Colwell
Mr. Mullen
Mr. Otto
Mr. Bayse
Mr. Greenleaf
Mr. Finzel
Mr. Kelleher
Mr. McKenzie
Mr. Mintz
Mr. Monroe
Mr. O'Malley
Mr. Revell
Mr. Stames
Mr. Young
Mr. Haynes
Mr. Hotis
Mr. Andrews
Mr. Douglas
Mr. Gavin
Tele. Rm.
Miss Devine

Judge:

Here is the request for authorization of the bribe in APPLE EYE. Since it is possible that the bribe might be paid tomorrow (assuming that Judge Hastings returns some of the Romanos' property), CID would like to have this signed at your earliest convenience.

Steve

File

-38-

54

Memorandum

Exec AD Adm. _
Exec AD Inv. _
Exec AD LES _
Asst. Dir.:
Adm. Servs. _
Crim. Inv. _
Ident. _
Insp. _
Intell. _
Lab. _
Legal Coun. _
Off. Cong. & Public Affs. _
Rec. Mgnt. _
Tech. Servs. _
Training _
Telephone Rm. _
Director's Sec'y

To : Mr. Monroe

Date 10/1/81

From : S. M. McWeeney

Subject : APPLE EYE;
BRIBERY

Attached is Miami's teletype requesting $125,000 bribe money.

PURPOSE: To obtain the Director's approval for Miami's request for $125,000 bribe money.

RECOMMENDATION: That Miami's request for $125,000 bribe money be granted.

APPROVED:	Adm. Servs. ____	Laboratory ____
	Crim. Inv. ____	Legal Coun. ____
Director ____		Off. of Cong. & Public Affs. ____
Exec. AD-Adm. ____	Ident. ____	Rec. Mgnt. ____
Exec. AD-Inv. ____	Inspection ____	Tech. Servs. ____
Exec. AD-LES ____	Intell. ____	Training ____

DETAILS: On September 19, 1981, a meeting was held at the lobby and restaurant area of the International Hotel, Miami, Florida, between UCA and William Borders. He, Borders, was given $25,000 by UCA and then Borders advised UCA that the Judge's second show of proof would be the return of a substantial portion of the property seized from the Romanos within ten days of this meeting. Borders advised that after this show of proof he would require the remaining portion of the bribe, $125,000, to be paid.

On September 23, 1981, Miami Office advised of the investigative steps to be taken to bring this matter to a logical conclusion:

Detached & Handle separately
Enclosures (1)

58-10762-30

21 OCT.13.1981

1 - Mr. Mullen
1 - Mr. Monroe
1 - Mr. Caro
1 - Mr. McWeeney
1 - Mr. Nelson
1 - Mr. Hilly

-39-55

SPH:mab

(SEE DAD-CID ADDENDUM - PAGE 4)

70 NOV 4 [illegible]

Memo from Mr. McWeeney to Mr. Monroe
Re: APPLE EYE

(1) Immediate installation of pen register equipment on William Borders' residence and business telephones. Miami and Department of Justice contemplated pen register coverage of Judge Hastings' residence and business telephones, however, after consultation with FBIHQ, it was decided not to institute pen register coverage until after Judge Hastings signs order in this matter.

(2) When Judge Hastings signs the order to return property seized to the Romano Brothers by September 30, 1981, the Miami Office will obtain Title III orders for ELSUR coverage of Borders' telephones, as well as for Judge Hastings' telephones.

(3) UCA will make telephone calls to William Borders in an effort to get Borders to call Judge Hastings concerning the Romano Brothers' case.

(4) On October 3, 1981, a final payment of $125,000 will be made to Borders at which time Borders will be arrested and interviewed.

(5) Interview of Judge Hastings.

(6) Presentation of the facts before a Federal Grand Jury.

It is noted that the above scenario is flexible and may be revised as the circumstances dictate.

On September 24, 1981, Chief Judge John Lewis Smith, District of Columbia, signed an order authorizing the installation and use of pen register devices for Borders' residence and business telephones.

Title III affidavits are being prepared for electronic surveillances for Borders' telephones as well as for Judge Hastings'

The attached Miami teletype requests $125,000 bribe money. After consultation with FBIHQ, it was decided that these monies will be given to Borders. He, Borders will then be placed under tight surveillance by the Miami Office to determine if he is to meet with Judge Hastings. If it is determined by the Miami Office through surveillance that Borders is not going to meet Judge Hastings, then he, Borders, will be arrested.

-40-56

Memo from Mr. McWeeney to Mr. Monroe
Re: APPLE EYE

Since there is a pending Title III affidavit, at the Department of Justice, for Borders' office telephones, the Miami Office will not pay these monies to Borders until this Title III affidavit has been approved and an order issued by a United States District Judge, District of Columbia, and in addition until such time as the undercover agent has generated telephone calls to Borders' office in an effort to get Borders to call Judge Hastings.

INSPECTOR-DEPUTY ASSISTANT DIRECTOR
ADDENDUM: CRIMINAL INVESTIGATIVE DIVISION DEC:jam 10/2/81

Subsequent to preparation of this memorandum, the Title III application for telephonic coverage of Borders' business telephones was obtained and will be operational this date. In line with this, the following observations and comments are made:

I recommend that the $125,000 bribe money be provided to SAC, Miami personally to afford the Miami Division the flexibility necessary to continue the investigative scenario. However, SAC should be clearly instructed that no ~~additional~~ payment be made to Borders without:

from this amount WAW

(1) Additional recorded incriminating conversation between Borders and UCA implicating Judge Hastings (UCA attempting to make this call this date).

(2) Authorization from DOJ to arrest Borders upon receipt of payment.

The aforementioned telephone call, hopefully, will result in Borders telephonically contacting Judge Hastings requesting the Judge to expedite signing an order returning a substantial portion of the property. Contact between Borders and Judge Hastings may not, in fact, be recorded and payment to Borders should not be predicated upon same. However, prior to payment and upon arrival in Miami, Borders should be placed under continual surveillance in hope that he can be placed in personal contact with Judge Hastings. If this meet does not occur prior to scheduled meet with UCA, Borders should be paid bribe and arrested immediately. No interview of Judge Hastings should be authorized prior to exhausting efforts to have Borders' cooperation obtained, but no immunity granted, in targeting Judge Hastings. Prematur interview of Hastings could and, I believe, would be unproductive. However, Judge Hastings should be interviewed ~~for exculpatory statements~~ only after the SAC is convinced that additional efforts to obtain Borders' cooperation would be fruitless.-

WAW

APPROVED: WAW
Director ________
Exec. AD-Adm. ____
Exec. AD-Inv. ____
Exec. AD-LES ____
Adm. Servs. ____
Crim. Inv. CAM
Ident. ________
Inspection ________
Intell. ________
Laboratory ________
Legal Coun. ________
Off. of Cong. & Public Affs. ________
Rec. Mgnt. ________
Tech. Servs. ________
Training ________

Memorandum

278

To : SAC, WFO (58-1899)

Date 10/9/81

From : SUPERVISOR PETER V. MARCOLINE, JR.

Subject : APPLE EYE
OO:MIAMI

On 10/6/81, a strategy meeting was held at the Organized Crime Section, FBIHQ, with Unit Chief, Jim Nelson, and Supervisor Sean Hilly. Attending from WFO was SA's Bob Foster, Dale Bird, and myself. Among the topics discussed, was the possibility of enlarging the scope of the investigation to include Santos Trafficante and the methods by which this could be accomplished. Another topic discussed was the posibility of enlarging the scope of the minimization requirements set forth by the Department of Justice in this case to include the ability to overhear conversations between the subjects and an individual identified as [redacted] O At the conclusion of the discussion, all present met with Chief Jerry McDowell, Deputy Chief Lee Radek, and Departmental Attorney Reid Weingrten. The main topic of discussion was the possibilities to be explored in the removal of Judge Hastings from the case involving Santos Trafficante. It was determined that this simply was not feasible in the Southern District of Florida. The possibilities of liberizing the minimization requirements was also discussed along with the general strategy of the case.

1-58-1899
1-Supervisor Peter V. Marcoline

PVM:kf
(2)

58-1899-71

SEARCHED ___ INDEXED ___
SERIALIZED ___ FILED ___

OCT 13 1981

FBI - WASH. FIELD OFFICE

Foster

-43-

59

ONE HUNDRED FIRST CONGRESS
Congreſs of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY
2137 Rayburn House Office Building
Washington, DC 20515-6216

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WILLIAM J. HUGHES, NEW JERSEY
MIKE SYNAR, OKLAHOMA
PATRICIA SCHROEDER, COLORADO
DAN GLICKMAN, KANSAS
BARNEY FRANK, MASSACHUSETTS
GEO. W. CROCKETT, JR., MICHIGAN
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CHUCK DOUGLAS, NEW HAMPSHIRE
CRAIG T. JAMES, FLORIDA

MAJORITY—225-3951
MINORITY—225-6906

October 16, 1989

The Honorable Senator Jeff Bingaman
Chairman
The Honorable Senator Arlen Specter
Vice Chairman
Impeachment Trial Committee
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman and Mr. Vice Chairman:

We have had an opportunity to review the post-trial brief filed on behalf of Judge Hastings. The House objects to the fact that respondent has once again delayed his filing until past every deadline. More significantly, counsel for respondent has seen fit to include in his brief citations to materials which were not part of the record developed before the Senate Impeachment Committee. The most egregious example occurs at pages 28 through 29 where respondent excerpts part of a Justice Department memorandum where a decision was made not to criminally prosecute Judge Hastings for perjury.

This memorandum was never introduced into evidence before the Committee. Moreover, if the memorandum had been offered at the Senate hearings, the House would have called the author of the memorandum, James C. Cole (Deputy Chief of the Public Integrity Section), to testify that the Department of Justice concluded unequivocally that Judge Hastings had in fact lied repeatedly at his trial. The declination memo only addressed whether the Department of Justice felt, in light of all the circumstances, that it could prevail in a second criminal prosecution.

This is not the only instance in which respondent's brief cites to materials outside the record. The House protests such actions and believes that the parties in their briefs and arguments are limited to facts in the record.

We request that this letter be made a part of the record of these proceedings.

Very truly yours,

John Bryant
House Manager

cc: Terrence Anderson
Michael Davidson

FINAL ARGUMENT ON THE MERITS AND SENATE DISPOSITION

UNANIMOUS-CONSENT AGREEMENT FIXING DATE AND TIME FOR FINAL ARGUMENT AND DELIBERATION

[From the Congressional Record—Senate, October 12, 1989]

Mr. MITCHELL. Mr. President, I ask unanimous consent that the Senate resume consideration of the impeachment proceedings against Judge Alcee L. Hastings of the Southern District of Florida at 2 p.m. on Wednesday, October 18, for the final arguments on the merits by the managers on the part of the House of Representatives and by Judge Hastings and his counsel.

I further ask unanimous consent that each side be permitted no more than 2 hours for its final argument and that final arguments made may be made by three persons on each side.

I further ask unanimous consent that on Thursday, October 19, at 2 p.m., the Senate shall meet in closed session to deliberate on the articles of impeachment and that these orders have effect notwithstanding any other rule of the Senate, including rule XXII.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MITCHELL. Mr. President, for the information of Senators, I want to indicate that the joint leadership will object to any unanimous-consent request to permit committees to meet on Wednesday and Thursday afternoons after 2 p.m., and a live quorum will be commenced on each of those days at 1:45 p.m. The Senate has many solemn responsibilities. One of them is to deliberate on matters involving impeachment. These are very serious matters. Of course, they are of the utmost importance to those involved in the proceedings.

Therefore, and I will ask the distinguished Republican leader to address himself to this issue, I urge every Senator to meet his or her public responsibility by being present during these proceedings. It is a disservice to the Senate and a disservice to those involved in these proceedings for Senators to absent themselves during impeachment proceedings. We have set this in plenty of time so Senators can adjust their schedules, and I hope that every single Senator will observe his or her responsibility and be present during these deliberations. I thank the distinguished Republican leader for his cooperation in this regard.

Mr. DOLE. Will the majority leader yield? I certainly share the views he just expressed. These are important proceedings and we are going to have two of these this month to deal with. I know Senators are busy with other matters, but in fairness to those who are threatened with impeachment, charged with impeachable offenses, I think it is our obligation, though I think it is a little outdated but is still on the books, we need to be here to make certain we carry out our responsibilities.

FINAL ARGUMENT OF THE PARTIES AND QUESTIONS FROM THE SENATE

[From the Congressional Record—Senate, October 18, 1989]

The **President** pro tempore. Under the previous order, the hour of 2 p.m. having arrived and a quorum having been established, the Senate will resume its consideration of the articles of impeachment against Alcee L. Hastings. The Sergeant at Arms will make the proclamation.

The **Sergeant at Arms**. Hear ye! Hear ye! Hear ye! All persons are commanded to keep silent, on pain of imprisonment, while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives against Alcee L. Hastings, U.S. district judge for the Southern District of Florida.

The **President** pro tempore. The majority leader is recognized.

Mr. **Mitchell**. Mr. President, on March 6, 1989, the President pro tempore appointed, pursuant to Senate Resolution 38, Senators Bingaman, Specter, Leahy, Durenberger, Pryor, Rudman, Bryan, Bond, Kerrey, Gorton, Lieberman, and Burns to perform the duties provided for by rule XI of the Senate's impeachment rules.

Under the leadership of its chairman, the Senator from New Mexico [Mr. Bingaman] and its vice chairman, the Senator from Pennsylvania [Mr. Specter], the committee heard 18 days of testimony between July 10 and August 3. During that time the committee heard from 26 witnesses who were called by the House of Representatives and 29 witnesses who were called by Judge Hastings. Judge Hastings testified on his own behalf over the course of 3 days. The committee also admitted into evidence the testimony of 26 other witnesses whose testimony had been recorded in prior proceedings, more than 150 stipulations of fact, and hundreds of exhibits.

On October 2 the committee filed its report, which was received as Senate Report 101-156. In accordance with impeachment rule XI, the committee report certified that Senate Hearing Report 101-194, which reprints the committee's proceedings, is a transcript of the proceedings and testimony had and given before the committee.

Before proceeding further, I would like to verify with the Presiding Officer that the evidence and testimony received by the Senate from the committee shall, as prescribed in rule XI, "be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy and materiality, as having been received and taken before the Senate * * *." Will the Presiding Officer advise the Senate whether this is correct?

The **President** pro tempore. The majority leader is correct. The testimony and other evidence reported by the committee will be considered, in accordance with impeachment rule XI, as having been received and taken before the Senate.

The majority leader is recognized.

Mr. **Mitchell**. Mr. President, rule XI provides that the Senate's receipt of evidence reported by the committee is subject to the Senate's right to determine competency, relevancy and materiality. Further, rule XI explicitly provides that nothing in it prevents the Senate from sending for any witness and hearing that witness' testimony in open Senate, or by order of the Senate having the entire trial before the full Senate.

Will the Presiding Officer advise the Senate whether, following the report of the committee, any motions have been filed by the parties to the impeachment asking that any witnesses be heard in open Senate?

The **President** pro tempore. In response to the majority leader, neither party, following the report of the committee, has moved that any witness be called in open Senate and the Senate may now proceed to hear final arguments on the basis of the record reported by its committee.

The majority leader is recognized.

Mr. **Mitchell**. Mr. President, the parties have filed their final written briefs, and the Senate is now ready to hear final arguments on the merits. In accordance with the unanimous-consent agreement of last week, each side will be permitted no more than 2 hours for its final argument and the arguments may be made by three persons on each side. Under impeachment rule XXII, final argument will be opened and closed by the House.

As we have done in the past, we have provided that counsel may face the full Senate during their presentations. They should remain mindful, nevertheless, that the proceedings are under the direction of the Presiding Officer. On their part, Senators should recall that any questions they have should, pursuant to impeachment rule XIX, "be reduced to writing, and put by the Presiding Officer." There is secretarial assistance available in the respective cloakrooms to aid Members in the drafting of questions. Questions may be sent to the Chair during the argument, for reading by the Chair at the appropriate times.

The managers on behalf of the House of Representatives, Representative Jack Brooks, Representative John Conyers, Representative Mike Synar, Representative John Bryant, Representative Hamilton Fish, Jr., and Representative George Gekas—and special counsel to the House, Alan Baron, are present at the manager's table. Terence Anderson, Patricia Graham Williams, and Robert Catz are counsel to Judge Hastings and are present with him.

The **President** pro tempore. The Chair understands that final arguments for the House will be presented by Representative Bryant, Representative Conyers, and Representative Gekas. Mr. Bryant has asked to speak first.

Mr. Bryant, do you wish to reserve a time for closing, and, if so, how much time?

Mr. **Bryant**. Mr. President, we ask to reserve whatever remainder of our time is remaining in our 2-hour allocation in closing.

The **President** pro tempore. Very well. You may proceed.

Mr. **Bryant**. Mr. President, on behalf of the House of Representatives, I wish to thank you and the Members of the Senate for the opportunity of presenting our closing argument and, along with the other House managers, wish to express our appreciation for the time and the effort the Senate has taken in this impeachment proceeding.

I will begin our presentation, and I will be followed by the Honorable George Gekas, of Pennsylvania, and the Honorable John Conyers, of Michigan. We hope not to use our entire 2 hours and, as previously stated, ask to reserve the remainder of our time for final closing.

Members of the Senate, this is a case of enormous, and perhaps unprecedented, importance. It involves not simply a crime committed by a judge which is related to the office which he holds. It involves a violation of the most fundamental legal and moral obligations of a jurist, behavior that strikes at the heart of his obligation to our system of justice. This case involves the participation of a U.S. district judge in a scheme to extort a bribe from a defendant in his own courtroom.

For those of us in the House who were charged with the responsibility to recommend for or against impeachment to our colleagues, this was a difficult case. Members of the Subcommittee on Criminal Justice, which each of us are, took this assignment with great skepticism. We knew that on one of the central charges referred to us, Judge Hastings had obtained an acquittal in a criminal trial.

And more than one of us was heard to state our skepticism about considering the impeachment of anyone who had previously obtained a favorable verdict in a jury trial. But our decision to reserve judgment on this matter until we saw the facts proved to be a good one because, Members of the Senate, there was not one verdict on this matter, there were two jury verdicts.

One year before Judge Hastings' trial, his co-conspirator, William Borders was tried on the very same facts for the very same charge. In fact, the two men were codefendants in the same indictment, but their trials had been severed due to pretrial motions.

That jury, the jury in the Borders' case, determined beyond a reasonable doubt that William Borders conspired with Judge Hastings to obtain a bribe from defendants in the judge's own courtroom.

In daily attendance at William Borders' trial was Judge Hastings' lawyers, gathering a preview of all the Government's evidence and giving the judge a year to fashion a version of events and fabricate evidence to mislead the jury in his case. And also awaiting our inspection was the work of the Federal judiciary. The Investigative Committee of the Eleventh Circuit, which spent 3 years carefully studying all the facts in this case, unanimously concluded that there was clear and convincing evidence that Judge Hastings is guilty as charged. They have determined that he engaged in a bribery conspiracy and that his acquittal was a product of intentional false testimony. The Judicial Council of the Eleventh Circuit reached the same conclusion, and the U.S. Judicial Conference then determined that Judge Hastings' conduct warranted referral to the House.

In other words, it was the action of the judicial branch. And I would point out that many of the participating judges in this process had significant civil rights backgrounds. It was the action of the judicial branch that placed this responsibility before us, and we now place it before you.

We were than faced with the same question that faces you as Members of the Senate: What if a Federal judge participates in a conspiracy to obtain a bribe, but by the use of false testimony and fabricated evidence is able to obtain an acquittal? What if all the facts indicate the judge's guilt? Are we in that unusual circumstance to look away because of two contradictory jury verdicts and by our inaction allow the judge to continue to serve?

Certainly the answer for us and for you must be no. We had the obligation to take the matter up, and upon a both painful and painstaking study of the facts in an independent investigation, we concluded unanimously that we must recommend impeachment to the House. And the House by a vote of 413 to 3 charged Alcee Hastings with 17 articles of impeachment.

We deeply believe that Judge Hastings conspired to obtain a bribe from defendants in his courts, that to avoid conviction from this crime he fabricated evidence and lied to a Federal jury 14 times, and that in a separate transaction, to be addressed later by Mr. Gekas, he revealed the confidential content of a federally authorized wiretap under his supervision.

The facts which led us to this belief we contend are overwhelming.

On Friday, October 9, 1981, U.S. District Judge Hastings of Miami, FL, arrived at Washington National Airport, where he was met by a prominent Washington, DC, attorney and personal friend of 12 years, a man named William Borders. Borders took Judge Hastings to the L'Enfant Plaza Hotel, where the two of them checked into a suite with adjoining rooms, and then, after a few intermediate stops, they went to William Borders' law office. There Borders received a message from Frank, who Borders believed to be Frank Romano, a defendant in a criminal case pending before Judge Hastings.

Frank was an undercover FBI agent who for 4 weeks had been posing as Frank Romano and already paid $25,000 down on a $150,000 bribe which had been negotiated for favorable treatment by Judge Hastings in the case then pending against Frank Romano in the judge's court. Frank told Borders, "I have all the necessary papers," and Borders, knowing what that meant, arranged to meet Frank at the hotel to collect the balance due. While Borders went to collect the money, Judge Hastings went back to his hotel room at the L'Enfant Plaza.

At 1 p.m., William Borders was arrested by the FBI, in possession of $125,000 in cash he had just received from the agent posing as the defendant in Judge Hastings' court.

At about 3 p.m., Judge Hastings learned that Borders had been arrested, was told that the arrest had something to do with bribery in his courtroom and was told that the FBI had asked that he call them so that they could interview him about the matter. Judge Hastings was given the number of the Washington field office of the FBI.

But Alcee Hastings did not call the FBI as requested. Instead, U.S. District Judge Alcee Hastings fled from the city. Though he had just arrived that morning with plans to stay through the weekend, he left Washington, DC, at that moment, so fast that he did not check out of the hotel: He did not pay his bill, he even left behind one of his suits.

Where did he go? The logical route back home to Miami would be to go to National Airport, 10 minutes away from the L'Enfant Plaza Hotel, where a Miami-bound flight with seats available was scheduled to leave that afternoon, according to the record we provided to the Senate trial committee. That route of leaving was too logical. Instead, Judge Hastings took a $50 cab ride to the Baltimore-Washington International Airport, 1 hour and 32 miles away from his hotel.

When he arrived at BWI, he did not immediately make a reservation to fly home. Instead, he made his first phone call since learning of the bribery conspiracy scheme's discovery by the FBI. He called his mother. He then called Patricia Williams who at that time was his fiancee. He spoke with her briefly and then he moved to another pay phone and he called her again. Then he gave her the number of his pay phone and told her to leave her house and go to a pay phone and call him back at that pay phone. When she did so 20 minutes later, he took her pay phone number and moved to yet another pay phone and called her once again.

Forty minutes later, Judge Hastings boarded a plane destined for Miami International Airport where his car was parked, but when the plane made an intermediate stop in Fort Lauderdale, Judge Hastings got off the plane and rented a car.

I ask Members of the Senate rhetorically, what would cause a U.S. district judge to act in this way; to flee from a city after learning of the arrest of his close friend, to leave town by a circuitous route only a few hours after having arrived, and to leave his hotel without even checking out? Why would a U.S. district judge move from pay phone to pay phone in order to carry on a conversation and instruct the person who was calling to leave home and call him back from a pay phone?

The answer, we submit to you, is that he did so because he knew that he was guilty of the bribery conspiracy for which his good friend Bill Borders had just been arrested. He had engaged in a corrupt conspiracy to obtain $150,000 from defendants in his courtroom in exchange for which he would reduce the defendants' prison sentences to probation, as charged in article I of the articles of impeachment. He knew that if he stood any chance of avoiding prosecution himself, he would have to get his story together before facing the FBI, lest he give away too much and permanently condemn himself.

So, on October the 9th, instead of contacting the FBI and assisting them in their investigation, instead of helping his friend William Borders, who had just been arrested, U.S. District Judge Alcee Hastings fled the city to buy himself some time.

We submit to you today that Judge Hastings' flight from Washington, DC, on that day is only one piece of the pattern of clear and convincing evidence establishing Judge Hastings' guilt. Ironically, Members of the Senate, it is not left to the House managers alone to prove the involvement of Judge Hastings, for Judge Hastings, in the very beginning, set out to prove it himself.

For months, William Borders had been attempting to entice the Romano brothers into a bribery deal. Unbeknownst to Borders, and unbeknownst to the judge, the Government had gotten wind of their scheme and ultimately Borders set up a bribery deal not with the real Frank Romano, but with an undercover agent who he thought was Frank Romano. It was during their very first meeting that the agent posing as Frank Romano asked for proof of Judge Hastings' involvement in this bribery conspiracy before he would be willing to pay any bribe money. Borders said, OK, we will do it this way. The judge will signal that he is a player in two ways: First, he will show up at a particular time and a particular place of your choosing and, second, after a downpayment on the bribe, he will order the return of a substantial amount of your property which he had previously ordered forfeited under the Federal RICO statutes after the trial in the case.

Members of the Senate, Judge Hastings took both actions promised to prove his involvement in the bribery scheme to his coconspirators, and we submit that he did prove it, not just to the other participants in the scheme but also to the House and also to the Senate.

First, there was the promise that he would show up at a particular time and place. When they met on September 12, 1981, to set up the bribery deal, Borders and the man he believed to be Frank Romano agreed to this. And the undercover agent gave Borders the chance to check with the judge to determine when the judge was available to show up at a particular time, to signal his involvement. But Borders, if you will read the record of this case, did not need to check. He did not hesitate. He immediately picked Wednesday, September 16, 1981, as the date of the show. The undercover agent then chose the time and the location. He said 8 p.m. in the main dining room of the Fontainebleau Hotel.

What happened on September 16, Wednesday, September 16, 1981? A little before 8 p.m., Judge Hastings arrived at the Fontainebleau Hotel in the main dining room exactly as promised, as the deal was constructed. He came with a date, a lady named Ms. Essie Thompson, who testified before the impeachment trial committee, and until even today is still a friend of the judge.

Judge Hastings contends that he went to the Fontainebleau that night not because he was part of a bribery deal but because William Borders, his friend, had asked him to be there.

But we ask this question. If this was the case, why then did Judge Hastings make a reservation for only two people at the Fontainebleau Hotel that night? Why, as Ms. Thompson unequivocally testified to the trial committee, did the judge never mention to her that they were planning to meet William Borders or anyone else that evening? And if the Judge's version was true that William Borders was tricking him into coming to the Fontainebleau Hotel that evening, why would William Borders ask the judge to meet for dinner on the very night which we now know William Borders was attending the Sugar Ray Leonard-Tommy Hearns championship fight in Las Vegas, a fact that had been known to the friends and employees of Mr. Borders for weeks. He was an inveterate fight fan and he planned for many weeks to be in attendance at that fight. It was a fact that would have been easily discovered by Judge Hastings, his good friend.

Members of the Senate, these questions are based on facts that are in the record and have never been answered by Judge Hastings. Indeed, he cannot answer them because he appeared at the Fontainebleau Hotel on September 16 to prove his involvement in the bribery conspiracy. He proved it to his coconspirators in order that the deal might proceed, and he proved it to the U.S. Senate.

There is the second proof that Judge Hastings was to give in order to prove his participation in the deal. William Borders and the man he believed was Frank Romano also agreed that after a down payment on the bribe was paid, Judge Hastings would issue an order returning a substantial amount of the Romanos' property, which he had previously ordered forfeited, and this would show the judge's clear intent to cooperate in the conspiracy.

The deal was that once the order returning the property was issued, the Romanos were to pay the remainder of the bribe. Then Judge Hastings would reduce their prison sentences to probation as had been agreed.

Again, Judge Hastings proved that he was on board. On September 19, 1981, the undercover agent made the $25,000 downpayment, after which Borders said that the order would issue, the order returning a substantial portion of the property would issue in 10 days. But the order did not come out on time, and so on October 2 the undercover agent, the man posing as Frank Romano, called Borders to ask what was up, to inquire why the order had not been issued on time. This was a Friday afternoon.

In that conversation, the first in a series of recorded conversations, Borders told the agent that he would check into the order that day but added, "I don't know if I can find out because of the time." Within 2 hours, Borders called Judge Hastings. He was informed the judge had left for the day.

And 2 days later, on Sunday morning, October 4, the undercover agent again called Borders. This time Borders said he didn't have an answer, quoting him, "cause I haven't been able to talk to anybody." That afternoon Borders again called Judge Hastings, and the very next morning, Monday, October 5, Judge Hastings told his law clerk to get the *Romano* forfeiture order out, to get it issued that day.

We ask, was there any legal deadline requiring the issuance of the *Romano* order on that day? The answer unequivocally is "No." The order had been pending for months. Nothing had happened in the case to require immediate action on the order. It was not in fact until the bribery scheme was in place, the down payment had been made and the series of phone calls between the undercover agent, Borders, and Judge Hastings had occurred that Judge Hastings took any action. On October 6, 1981, Judge Hastings issued an order reversing himself—returning $845,000 of the over 1 million dollars worth of Romano property which he had previously ordered forfeited, just as Borders had promised.

Now, Judge Hastings responds to this damning evidence by saying that he told his law clerk to get the *Romano* order out because the clerk was leaving at the end of the month and the judge had a heavy travel schedule taking him out of the office. But this cannot be true, because, as the evidence establishes, the law clerk was not scheduled to leave for another 4 weeks and the judge's travel schedule had him at home in the office for half of the workdays in October 1981. There was ample opportunity for the judge to sign the order in advance of the law clerk's departure.

Plus there are other undisputed incriminating facts. It was unusual for Judge Hastings to demand that an order be finished the same day according to the record in this case. The law clerk, in fact, was sufficiently impressed with the urgency of the specific matter that he had to leave the office and drive 45 minutes to his home to work on it. The judge did not ask his law clerk to finish any other pending work prior to his departure from employ with the judge. And most telling of all perhaps is the fact that the judge pressured his staff not only to get the order written but also to get the *Romano* order mailed out, which would have nothing of course to do with whether or not the law clerk was departing his employ in a month. Indeed, as Marilyn Carter testified before the Impeachment Trial Committee—and I would point out that she is still to this day Judge Hastings' deputy clerk—the judge told her, "Sorry for the rush, but this must go out today." Ms. Carter, in fact, felt so much pressure that she dropped other work and she even sent the order out special delivery.

Members of the Senate, only the judge could issue this order. The *Romano* forfeiture order went out on October 16, 1981, to prove to the man they believed was Frank Romano that the judge was an active participant in the conspiracy and that he could be counted on to complete the terms of the deal if the balance of the bribery money was paid. The bribery scheme then was on track.

Now, what else is known about Judge Hastings and Borders' relationship which can shed light on whether they conspired to solicit a bribe. How often were they in contact in order to pass information to each other about the *Romano* case? Again, facts that are in the record and which are absolutely undisputed provide the answers.

First, as a politically active Democrat, with connections in the White House, William Borders, the record reflects, helped Judge Hastings get appointed to the Federal bench. Judge Hastings even testified to that fact himself.

Second, Borders even attended Judge Hastings' investiture ceremony when he was sworn in as U.S. district judge.

But we submit to you that most telling about the relationship is the fact that William Borders has refused to testify in this impeachment proceeding as well as in all other proceedings in which, if Judge Hastings' version of the facts is true, Borders could have established Judge Hastings' innocence. Borders is in jail today at this moment and will be until this body votes, and he is in jail for refusing to testify before the Impeachment Trial Committee despite a grant of immunity. I ask you, on behalf of the House managers, why would he go to jail, again, if by his testimony he could honestly vindicate his close friend of so many years?

The fact is that Borders will not talk, because if he tells the truth he must acknowledge Judge Hastings' role in the conspiracy, and if he does not tell the truth he risks placing himself in violation of the law again. And that is why he refused to testify, and that is why the judge did not call Borders to testify at his own trial. Judge Hastings explained his failure to call Borders by saying that Borders would not talk because he feared for his life, but before the Senate Trial Committee when Senator **Rudman** asked Borders if fear of his life was the reason he would not testify, Borders had no idea what the Senator was talking about.

We submit there can be no clearer picture of the complicity of Judge Hastings and Borders in this scheme than the documented contacts between the two of them.

Starting back in February 1981 every time there was a significant event in the *Romano* case, Judge Hastings and Borders were either together or on the phone. In fact, throughout 1981, almost all of the contacts between the two men correlate precisely with events in the conspiracy. For example, on the very day Judge Hastings entered the order initially forfeiting $1.16 million of Romano property, he left an urgent message for William Borders. On the day Borders learned that the man he believed to be Frank Romano was interested in making a deal, there was a flurry of documented phone calls between Borders and the judge. The night before the first meeting with Frank Romano set up a deal, Judge Hastings and Borders went to great lengths as reflected in the record to arrange and rearrange their flight schedules in order to cross paths and to be together at National Airport. After the first meeting with Frank Romano, the man they believed was Frank Romano—and promising that the judge would appear at the Fontainebleau Hotel, Borders made Herculean efforts to return to the District of Columbia in time to be with Judge Hastings that night. And when the undercover agent asked about the promised order returning a substantial amount of Romano property, which was late, Borders immediately called the judge. All of this is in the record.

These are only a few of the documented contacts between the two men—contacts that were often of brief duration, at odd hours and at least once involved pay telephones. As set forth in our brief, there are at least 19 instances between February and October 1981, in which Judge Hastings and Borders were in contact at critical times in the bribery conspiracy. Borders clearly was not acting alone. The pattern is too precise. I urge you on behalf of the House managers to take a look at our master chronology, appended to our brief, setting out the incriminating pattern. In fact, take a look at the fact that 3 days after Borders' arrest—3 days after Judge Hastings allegedly learned that Borders had implicated him in a bribery conspiracy—a call was placed from Judge Hastings' home phone to Borders' home phone. If indeed Borders had betrayed him, had victimized him for profit, as he will contend before the Senate today, why was the judge calling him at his home?

But perhaps, however, the most incriminating telephone call of all is the call made by Judge Hastings to Borders on October 5, 1981, which is known as the "coded conversation." This conversation was also recorded. We listened to it. You can listen to it. So we know exactly what was said.

You will recall that on the morning of October 5, the judge told his law clerk to get the *Romano* order out that day. At 4:22 that afternoon, the undercover agent, posing as Frank Romano, called

Borders and was told that the order "has been taken care of." How did Borders know it had been taken care of? Then at 5:12 p.m., Judge Hastings called William Borders.

What do they talk about in this conversation? Allegedly letters of support for their friend Hemphill Pride who was in professional and financial trouble. According to the judge, this was a topic they had talked about every time he and Borders spoke in 1981. But members of the Senate, that conversation was not about letters for Hemphill Pride their friend. Instead, it was about the bribery conspiracy.

In the October 5 conversation, Judge Hastings was calling Borders to make sure the Romano deal was still on in spite of the delay in getting at the order returning property. Remember, the order did not go out in 10 days as Borders had promised the undercover agent. There has been a delay. Having instructed his clerk to do the order, the judge needed to make the call to be sure all was well before he sent the order out.

I urge you to take a look at the conversation. A copy of it is before you. I think if you look at it, it will become quickly apparent to you that simply on its face, the conversation makes no sense.

For example, if you look at the conversation received according to Judge Hastings he was calling Borders to get information about Hemphill Pride's financial status so he could finish some draft letters in support of Mr. Pride. But notice what he learns in the conversation. Borders tells me at line 18, "See, I had, I talked to him and he, he wrote some things down for me." The judge responds, "I understand." And then Borders tells him, "And then I was supposed to go back and get some more things." "Alright, I understand * * *" says the judge. My question and your question should be: what does Judge Hastings understand? Borders never explains what he is referring to as "things." He fails to give the judge any financial information at all. Yet Judge Hastings goes on to say at line 21, "Well then, there's no great big problem at all," and promises to send the "stuff" off in the morning. The point I am making here is that, in other words, having been told that Borders had not yet gotten the information Judge Hastings wanted, the judge ignores what would apparently be a critical fact, and announces his intention to go ahead with sending out the letters. This does not make any sense.

When Hemphill Pride who was the purported beneficiary subject to this conversation was asked about this conversation before the setting trial committee and before the House Impeachment Committee, he completely refutes Judge Hastings' testimony.

Next there is Hemphill Pride himself. I urge you to ask your fellow members who served on the Impeachment Trial Committee about Hemphill Pride's testimony. He was a powerful witness. He unequivocally testified that he did not know of any letters of support, he did not want any letters of support and, in fact, such letters would have hurt rather than helped him. Indeed, after this indictment for the bribery conspiracy, Judge Hastings even tried to convince Mr. Pride to see it otherwise to convince him that the judge's story about the letters was legitimate. Mr. Pride would have none of it. He also testified that Borders never asked him for any information, nor did Mr. Pride write anything down for him. It is hard to believe that Mr. Pride, who was Judge Hastings' best friend, would give such devastating testimony in this case if it were not the truth. His testimony, even if standing alone, damages Judge Hastings' explanation of the coded conversation beyond repair.

Next we submit there is the undisputed fact that Judge Hastings never even sent the draft letters, the direct opposite of what he promises Borders in the conversation, in spite of the fact that, according to the judge, he and Borders had been discussing the letters for 8 months and Borders had been pressuring him to send the letters out.

Not only that. Having announced that he would send the letters out the next day, he does not even tell Borders about his change of heart, a noteworthy fact in view of the fact that Hastings represents to us that that was a matter of critical importance to both of them. He does not call Borders back to correct the misimpression that the letters were going out. He does not mention the letter when again they talk on the phone and 4 days after the conversation when they are together all morning—that is the morning of Borders' arrest. The judge again does not tell Borders that the letters never went out.

We submit to you, Members of the Senate, that the letters never went out because the letters never existed.

And finally according to the coded conversation, there is Dr. Roger Shuy, a noted linguist at Georgetown University, who studied the conversation and testified before the Impeachment Trial Committee that the conversation is indeed is not about labor reported to be about, or what Judge Hastings said it was about. Instead, the conversation is a cover.

One characteristic he noted are all the pauses such as "ah," repeated words, and false starts in the conversation. In standard linguistic analysis, these characteristics occur when people are being careful about their choice of words. Look at where the pauses, false starts, and repeated words occur here—precisely around the topic words in the converstion. Take a look at lines 11, 13, and 18, for example.

Members of the Senate, the October 5 conversation was a means of passing information about the bribery scheme. Borders learned that the deal was still on track when he spoke to the undercover agent less than an hour earlier. He then, when Judge Hastings called him, conveyed the information to the judge. He reminded the judge that he got the downpayment "see, I have talked to him and he wrote some things down for me," thereby reconfirming the fact that he had gotten down the payment and that after the order comes out then he will collect the remainder of the bribe. Now it makes sense for Judge Hastings to state at line 21, "Well then, there's no great big problem at all. I'll, I'll see to it that, ah, I communicate with him. I'll send the stuff off to Columbia in the morning." The very next day, Judge Hastings sent out the order, returning a substantial amount of property to the Romanos.

Members of the Senate, this is only a part of the overwhelming evidence incriminating Judge Hastings in the bribery conspiracy: His flight from Washington, DC, the Fontainebleau Hotel, the *Romano* forfeiture order, the damning pattern of contacts and the coded conversation. We ask you to consider as well this other evidence of respondent's guilt:

Judge Hastings' undisputed knowledge that the Romanos had access to large sums of cash and were accustomed to making payoffs. During their trial he had learned that the Romanos had looted a construction project of over a million dollars and that they had frequently made payoffs in the course of their business.

We ask you to ask this question: How did Borders know about the *Romano* case in the first place? The fact is that Borders had no other source for the information about the *Romano* case except Judge Hastings. Borders did not practice law in Florida. He was a District of Columbia lawyer. The case did not receive national publicity. The *Romano* file, like all other case files, was kept in Judge Hastings' chambers and neither Borders nor his representative ever asked to review it. Plus all of the judge's staff deny making a disclosure of information of any kind about this case to any other party. Judge Hastings does not contend otherwise.

Then there is the incriminating pay phone to pay phone call made to Borders by the judge from just outside his chambers. This occurred at exactly the time the Romanos were first being contacted about the bribery scheme. Judge Hastings admits that he may have left his chambers and placed the call in response to a request by William Borders to go out to a pay phone and call him back. I ask you, what topic could they have been discussing that required the judge to leave his chambers and walk down the hall and use a pay phone to call another pay phone in the courthouse in Washington, DC?

Members of the Senate, we submit to you that this and all the other evidence in the record proves abundantly that Judge Hastings knew what was going on, that he was a player, and that as charged in the first article of impeachment, he conspired with William Borders to obtain a bribe.

But there is also something else that all the evidence proves: When confronted with his crime, Judge Hastings put himself above the law by repeatedly lying under oath to a jury. As charged in articles 2 through 15 of the articles of impeachment, Judge Hastings knowingly misled the jury in his criminal case and he thereby obtained his acquittal by fraud.

The record very clearly and convincingly establishes Judge Hastings' false testimony. As charged in articles 2, 3 and 4, he testified falsely when he explicitly denied being part of the bribery scheme. As charged in article 5, he intentionally misled the jury when explaining why he went to the Fontainebleau Hotel on September 16. And, he lied under oath when he stated that he was surprised—his own word—when William Borders showed up to see him after setting up the bribery deal, as charged in article 6.

As if this was not enough, Judge Hastings also testified falsely at his criminal trial about why he ordered his law clerk to get out the *Romano* order that day, and about the true meaning of the October 5 recorded conversation. These are the false statements charged in articles 7, 8, and 9.

He then misled the jury about four phone calls allegedly made to Hemphill Price—using telephone records which were his only credible documentary evidence in support of his claim that he was intimately involved in Mr. Pride's problems. Indeed, the judge even admits that his testimony was false in this regard. He has seen all the evidence and knows he has been caught, as charged in articles 10 through 13. So at this late stage of the proceedings, the judge now attempts to characterize this false testimony as a mistake.

And finally, as charged in articles 14 and 15, Judge Hastings lied about why he fled Washington, DC, after learning of Borders' arrest, and particularly about why he fled by way of BWI.

Members of the Senate, just one of these calculated false statements made under oath is more than enough reason to remove Judge Hastings from the Federal bench. But the judge did not intentionally mislead the jury just once. As charged in the articles of impeachment, 14 different times during his criminal trial, Alcee Hastings violated his oath to tell the truth. He knowingly misled the jury to obtain an acquittal, and he did receive that acquittal.

Now what does Judge Hastings say to all of this? How does he defend himself? He defends himself first by raising extraneous issues, not by confronting the facts because, in short, they cannot be refuted.

Judge Hastings attempts to divert your attention from what is the truth by complaining about how the Senate conducted this proceeding. He complains about the House, the Federal judiciary and the FBI. Indeed, he has been quick to angrily denounce all of these institutions and witnesses who testified against him. But I think it is important to note that not once did he voice anything against the man who he now claims wronged him, William Borders, until pressed during questioning by Senator Specter.

The judge devotes an inordinate amount of time criticizing William Dredge, the man who told the Government about the planned bribery conspiracy—even though the evidence irrefutably establishes that what Dredge told the Government was corroborated and, indeed, Dredge had nothing to do with the bribery scheme once it got underway.

Instead of presenting facts, Judge Hastings makes the totally unsubstantiated claim that missing witnesses and documents would vindicate him. But what missing witness or document could explain away his appearance at the Fontainebleau Hotel or the issuance of the *Romano* order immediately following the calls between the undercover agent posing as Romano, Borders and the judge?

Finally, when Judge Hastings does address the facts, his explanations of his conduct are absolutely incredible and impossible to accept. For example, when asked why he made a reservation for only two people at the main dining room of the Fontainebleau Hotel if, in fact, he and his date were expecting to meet William Borders there, the judge replied, "I only made reservations for two people to eat because that's all I was going to pay for." Surely, that is not a credible response to an incriminating set of circumstances.

When asked about the call from his home to Borders' home three days after Borders' arrest, Judge Hastings testified that he was calling William Borders' mother, who lived with her son, on the behalf of the judge's mother. But later Judge Hastings had to admit on the stand that the mothers do not even know each other.

My final example is the judge's explanation for why he fled Washington, DC, after learning of Borders' arrest. At his criminal trial, Judge Hastings testified that he made two telephone calls from his hotel before leaving town. He unequivocally stated that he called his mother and learned she was hysterical because reporters were already banging at her door. He testified under oath that he called his fiancee, Patricia Williams, who told him that both she and his staff had already been interviewed. Accordingly to the judge, that is why he fled town—because of what he learned from these calls.

But Members of the Senate, that very same night, when they finally caught up with him near midnight, the FBI asked the judge why he left town so fast. Curiously, he did not say anything to them about any calls from his hotel room to his mother or his financee. And, as shown in the Senate trial committee, there is no record of the calls—indeed, the hotel records do not reflect any calls to south Florida during the relevant time period. Plus reporters had not even reached Mrs. Hastings' home yet, nor had Ms. Williams' interview been completed.

In short, Judge Hastings' explanation at his trial of his incriminating flight from Washington was totally false. We submit that even the judge has reached the conclusion that it is unbelievable. For now, before this body at this late date, he has taken the position that he thinks he made the calls to his mother and Ms. Williams, but perhaps he made a mistake. Senators, there was no mistake. Is there any question how he obtained that acquittal in that jury trial? He created a story and lied under oath.

I will make only two final points.

The judge is going to assert to you today that William Borders was rainmaking, a word which the judge and his counsel defined as being a scheme by which a lawyer promises to be able to control actions of a judge in order to extort money from a defendant, knowing full well that he has no power over the judge whatsoever.

There is no doubt that Borders set up a bribery deal and that he made promises about the judge. Judge Hastings claims that when doing so, Borders made promises that he knew he could not keep but this is simply wrong. Not only does all the evidence establish Judge Hastings' guilt, but perhaps the most telling fact of all is at the same time this was taking place, Borders was also making promises to one Santo Trafficante.

Who was Trafficante? He was the reputed crime boss of south Florida. He controlled the underworld in that region and by all accounts was a very dangerous man at the time. At the same time the Romano bribery conspiracy was going on, Trafficante also had a criminal case pending before Judge Hastings. There is evidence in the record for you to examine that Borders was cutting a bribery deal with Trafficante as well at the same time.

We submit to you that it is not credible that Borders would be tricking Trafficante, promising favorable treatment by Judge Hastings which he knew he could not deliver. According to the witnesses who testified before the Impeachment Trial Committee, Trafficante knew how to retaliate. No one in his right mind would pull a trick like that on Trafficante. Borders was no rainmaker. He was involved in a bribery scheme with a knowing Federal judge, Alcee Hastings.

My final point is this: Judge Hastings also complains that the manner in which he was investigated by the Government back in 1981 left what he calls a cloud of suspicion which, despite all of his efforts, he will never be able to dispel.

For this reason, he claims he should be free of the charges before him pending in the Senate, too. But Members of the Senate, I submit to you that Judge Hastings is right. There is a cloud of suspicion, but it was not created by the FBI, or by any institution of the Federal Judiciary, or by anyone else, but by the judge himself.

In fact, it is more than a cloud of suspicion. It is a mountain of evidence pointing to his certain guilt. The truth is that Judge Hastings internationally proved, by his own actions, his complicity in this matter, to make the bribery deal work. He intended only to prove it to his coconspirators. But in doing so, he proved to all the world and to the House and to the Senate that he conspired to obtain a bribe and that he knowingly violated the oath he took to tell the truth at trial.

We respectfully ask you to find Alcee Hastings guilty as charged in articles I through XV and thereby to remove Alcee Hastings from office.

The PRESIDENT pro tempore. Thank you, Representative Bryant.

Representative Gekas will now continue the argument for the House.

Manager GEKAS. Mr. President, Members of the Senate, and our colleagues on the House side, Mr. Anderson, and to Judge Hastings and cocounsel, to all, I, too, want to express my gratitude for the extraordinary privilege of presenting the case in this instance before the Senate and to express the heartfelt devotion and belief that we have in this case.

Article XVI of the articles of impeachment: "Stay away from Kevin Gordon, he's hot, he's been using your name in Hialeah." It takes just a few seconds to utter that little phrase, and it sounds like something out of a Humphrey Bogart movie of the 1930's. And yet that little expression constituted a monumental breakdown of several investigations of law enforcements efforts to do some good in the Miami area and to bring disgrace on that court and on our system of justice, and constitutes a treachery to the American people as well.

The title III wiretap law that a Congress prior to ours put into effect called for a system whereby because we were not quite certain if law enforcement would overreach itself, it compelled the law enforcement agency that wanted to indulge in a wiretap situation to go to the court and to have the court order and directly monitor and supervise a wiretap.

Why? Because Members of the Congress felt that if anyone could be trusted to supervise a wiretap investigation, a wiretap situation, and thus ensure the public that no undue invasion of privacy would occur and that no violation of civil rights or other violations would occur, we would, the Congress said, entrust a judge to make sure that this wiretap investigation was pure and good.

So we see that in the summer of 1985, with all kinds of activities occurring in the Miami area, the FBI embarking on several investigations almost simultaneously, one an investigation into the longshoremen at the docks who were extorting large sums of money in return for memberships to their hallowed union; another investigation was occurring in the community of Hialeah where there were allegations that public officials would be subject to bribery in return for preferences in zoning and other favors; and a third one about police corruption in the community of North Bay Village in which, in return for bribery and payoffs, police officers would look the other way while offloading was occurring as to drugs in that community.

The FBI, critical as their efforts are and criticized often as they are, even by Members of our Congress, for some of their activities, were intent on doing a job for us and the American people in their area, in Miami. So, they undertook, with the cooperation of the U.S. Attorneys office, as is always the case, to undertake a wiretap.

They went to the court, and the luck of the draw, the judge of the month who was to undertake these kinds of special requests was Alcee Hastings. The disclosures were made to the judge of the necessity for the wiretap, a full account of the investigations at hand, the existence of undercover men on the part of the FBI who had to infiltrate the longshoremen and the zoning people in Hialeah, and the police establishment in North Bay. Undercover agents were involved in these wiretap investigations.

Under that title III, as all of you know, weekly progress reports had to be given after the authority was granted for a wiretap so that the judge could see what was happening; was there any progress being made; was it worthwhile continuing the investigation; should we continue the wiretap, or is it falling flat and therefore we should withdraw it because it is not doing any good, it could be violating somebody's privacy rights.

So these weekly progress reports were even rendered to Judge Hastings. All of a sudden, it is noted that in the weekly conversations held with Judge Hastings by the U.S. attorney or the FBI agent presenting the progress report, there was a little colloquy between the judge and the officer on some of the names that appeared in the disclosures and requests for wiretapping. Mayor Steve Clark of Miami, FL, was mentioned; Kevin Gordon was mentioned, and indeed one of the targets of the requested wiretap was Kevin "Waxy" Gordon.

The judge, throughout all those weekly progress reports throughout the summer of 1985, asked only two questions about the whole content of all these progress reports, and both of them had to do with Mayor Steve Clark and Waxy Gordon, words to the effect—the transcript has it; it is at your disposal—words to the effect that Kevin Gordon is hot, and the mayor better watch out what he is doing with Kevin Gordon. Or, that is heavy stuff; the mayor better watch out what he is doing with this Kevin Gordon.

You will recall from the reading of the transcripts and of the reports of the committee that indeed these were the subjects of the dissertation between the judge and the requesting authority of the wiretap.

I ask you to hold that in suspense for a moment, to remember that the judge was asking about Mayor Clark and the effect that this whole thing about Waxy Gordon would have on Steve Clark.

The end of the summer, the beginning of September, at the Hyatt Regency Hotel in Miami on September 6, 1985, there was a great community meeting to give awards and to hear speeches, among which was the main speech of the day scheduled for Alcee Hastings.

Mayor Steve Clark was there. It is undisputed that Mayor Steve Clark and Alcee Hastings were together for a brief period of time. How brief, I do not know.

How brief, I do not know. Nobody knows exactly how much time they spent together, but they were together. And a Monsignor Walsh, who testified throughout all these proceedings, concurs that, indeed, the three of them were together at one time, and indeed, of course, two of them, Steve Clark and Alcee Hastings, had to be together.

In a brief period of time, an exchange was made, and only hours later the mayor, Steve Clark, in an insistent manner, made sure through his office that he would have an appointment with Kevin Gordon. And within hours he was in the presence of Kevin Gordon, when the mayor summoned Gordon to his side at a club and told him to stop using his name in Hialeah, and what did he think he was doing associating his name with whatever he was doing in Hialeah?

This was right after this little get-together at the Hyatt Regency Hotel in which Mayor Steve Clark met, ever so briefly, with Alcee Hastings, who were both joined at a particular point by Monsignor Walsh. What did this imply?

Then later you will find in the transcript abundant evidence to the effect that Kevin Gordon, who was now on tap—you know, he was the subject of the wiretap so that his calls kept reflecting little things. One of the things that kept recurring in his own wiretap reports to the FBI was that he was complaining about what Clark was complaining about, about Alcee Hastings revealing this investigation and telling him, telling Clark, to stay away from him, Kevin Gordon.

All these things may appear to you to be items of circumstantial evidence, and perhaps they are.

Now, I ask you to go back to the hotel with me for a moment and to listen, as you have, through the transcripts and through the questions that you posed and through the report of the committee that we have direct, unaltered, unaltering, unchangeable testimony from Steve Clark himself which fills in all this circumstantial evidence to which I have been alluding. How does it fill in? He testifies that on that morning at that hotel where he himself, Steve Clark, was going to be honored with a special award and in which he was going to listen to the speech to be made by Alcee Hastings that Alcee Hastings in a brief exchange said to him, "Stay away from Kevin Gordon. He's hot. He is using your name in Hialeah."

How long did that take? Could it have been uttered in that time space where Monsignor Walsh saw the two men together? Could it have been uttered at that time? Does the telephone call that the tapes show occurred in which Kevin Gordon was involved where he got a call from the mayor's office at about 8:48, or 8:50, close to 9 o'clock—was that a coincidence, or was that in direct, frantic preparation by Mayor Clark of the events that were disclosed in that brief exchange? Not a Humphrey Bogart movie, but at the Hyatt Regency Hotel on September 6, 1985.

Now, you might say, or a casual observer might say, so what if this indeed did happen, what consequences were there? You and I know the consequences.

But the actual consequences were that as soon as the FBI had this array of evidence that, indeed, their trusted judge, the one that they asked to supervise this wiretap, to authorize it, was revealing the information, leaking the information that was at the heart of the investigations, they could do only one thing and they did it. They ripped away the undercover man from the longshoreman situation. They dropped the Hialeah zoning investigation; killed both of them immediately. And for reasons best known to them, because they still saw vibrancy left in the police corruption situation in North Bay Village, left that alone for the time being. But these two important drug, longshoremen, corruption-of-public-officials cases were dropped.

And I might add, because of the consequences of that, and the fear of the discovery of undercover men we may still have consequences that are left to us today. As we speak here today, it may not be a safe climate in that area for the FBI to install undercover men or to otherwise pursue investigations of the type that Alcee Hastings caused to crash down in a heap of rubble.

But listen to Alcee Hastings' explanation of all that. Coincidence, the judge will say. "I cannot help it if on that same day when in that hotel I saw Steve Clark, that on that very same day Kevin Gordon was heard to say on the wiretap that I was supposed to stay away from him and all of that. That is just a coincidence."

But we know they were together. Monsignor Walsh knows they were together. It takes a brief time to say, "Stay away from Kevin Gordon. He is hot and he is using your name in Hialeah." A very short time. You can time that and see that you could say "Hello," and all of that within seconds. It could not have been coincidence. Could it have been coincidence that they just happened to go to that place, particularly at that time, and have a discussion, but not discuss what later turned out to be the core of telephone calls? Or would you believe the defense version of events, that Steve Clark is a liar?

Steve Clark testified before a grand jury, before a gathering of judges who were given the responsibility of listening to this case for judicial proceedings. He testified before a subcommittee in the House of Representatives and subsequently testified before the committee of your own body to hear the evidence—unwavering testimony, direct, important testimony from Steve Clark. There is nothing to indicate in the record or any allegations even made by the defense or from any point of view of any of the evidence in this case that he lied or had any motive to lie or any reason to lie. And he stood fast to his story even to the effect that he was sure—although he was mistaken, undoubtedly—he was sure that it took place after the speech by Judge Hastings and not before as the series of events of the telephone calls and the meetings which are related really show actually what happened. He was mistaken as to that.

But all of us who have been accustomed to trials and to review of evidentiary proceedings know that the best witness many times is mistaken in elements of the story that are not very important or, if important, are not as important as the core of his testimony, which on its face has to be believed or disbelieved in order to make a final decision, in this case, unswerving, unchallenged, undeniable, straightforward testimony by Steve Clark that, indeed, Alcee Hastings told him to stay away from "Waxy" Gordon, or Kevin Gordon.

Or, is it possible that Steve Clark was trying to frame Alcee Hastings for some ethereal reason that has never come to light? But what reason? There was given no personal animosity. In fact, they were friends or acquaintances, political coworkers, that kind of situation. Never any scintilla of evidence of any reason that Steve Clark should lie to get back at Judge Hastings for some reason again not revealed by the evidence or the record. Coincidence? Some coincidence.

And what a great array of evidence was brought in by the defense before the committee, before the subcommittee in the House, about what happened at the hotel and how it was impossible for the judge to have walked down and talked with Steve Clark after the speech because he was spirited out after the speech was made, out backstage and out back into the courtroom, and that shows, he says, that shows indubitably that Steve Clark is a liar. Is Monsignor Walsh a liar who saw them together, who saw them together for enough time, 10 seconds, 12 seconds? "Stay away from Kevin Gordon. He's hot. He is using your name in Hialeah." How long does it take him to utter that break in law enforcement continuity?

One of the most telling pieces of evidence that I have ever heard in my entire life came from the U.S. attorney who, when asked in direct question, or perhaps in cross-examination or perhaps from a member of the committee that was listening, from the Senate, said that he, a U.S. attorney, sworn to uphold the U.S. Constitution and do his duty, could never bring himself again to trust Alcee Hastings; could never feel comfortable in presenting a case before Alcee Hastings. And so it was uttered by others involved in this case.

Why? Because Alcee Hastings had destroyed the fabric of law enforcement for those particular times and in those particular circumstances in the Miami area. He not only was guilty of betraying the oath of office, as blatant as that is, not only in betraying the law enforcement officials and the standards of that community; not just the betrayal of his peers on the bench and the people of the United States' betrayal, but that betrayal, unlike any other of his misdeeds as part of these impeachment proceedings, actually endangered the lives of individuals sworn to law enforcement who, in other ways, every single day, risked their lives for us, the American people.

It was an episode of monumental betrayal. I thank the Senate.

The PRESIDENT pro tempore. Thank you, Representative Gekas.

Representative Conyers will now conclude the opening argument on the part of the House.

Manager CONYERS. Mr. President, Mr. Majority Leader, Mr. Minority Leader, Members of this distinguished body, when I came to the Congress 25 years ago, to this body from the civil rights movement, in part, from local activity, I think I was one of four black Members of the House. My agenda focused then, as it does today, on increasing access to political power for African-Americans and members of other minority groups who for so long have been excluded from positions of influence and authority in American life. I have seen some progress in this past quarter of a century and I also know, as you do, that we still have a long way to go.

As a lawyer who occasionally got into courtrooms, I have been before my share of hostile judges, racist judges, in the North and the South. I found nothing more satisfying, in the course of my congressional career, than to help the development of a capable and vigorous bar of African-American lawyers, men and women, and the elevation of some of its more outstanding practitioners to the prestigious position of Federal judge where they can serve, not merely as dispensers of equal justice under the law, but as models for their community and for the Nation.

So, I am saddened to come before you today to urge the removal of one of the handful of black judges who presently occupy the Federal bench. I am not happy to come here to argue that Alcee L. Hastings has forfeited his right to one of the most honored places in this American political system. But we did not wage the civil rights struggle in order to substitute one form of judicial corruption for another.

I do not question that Alcee Hastings is a man of extraordinary accomplishment who once contributed much to his community and to the Nation. But that recognition only saddens me all the more because his conduct of the last 9 years does not diminish his former accomplishments any more than his former accomplishments excuse his more recent misdeeds. It is precisely because he betrayed his trust and betrayed those who looked to him for leadership, the possibility of a fairer, better system, that our obligation to face the truth as we see it in this matter before us is so great.

This man has been a role model for all who want to see justice administered, administered with fairness and compassion, without regard to race or wealth. Instead, we argue that he must be removed from office, so that he may not teach others that justice may be sold and that our system of justice may be beaten by continuous outrageous prevarication; by blaming others and the system for one's own transgressions.

I cannot explain or have any claim to understand what caused the metamorphosis of this man. I can only deal with my impression of the facts, and they lead me to the indisputable conclusion that he has betrayed his office and is no longer fit to wield the power and authority that has been bestowed upon him.

No one could have been more skeptical than I at the start of this process. No one more anxious to ensure that this man be neither penalized for his race or insulated by his race, from the consequences of wrongful conduct. No one was more predisposed to believe the best of Judge Hastings and his case and to doubt his accusers. I said so.

I was also sympathetic to the notion that the jury verdict should have settled the matter. We had a delegate speaking on that with supposedly great authority just yesterday.

As chairman of the subcommittee that held the evidentiary hearings in the Congress, however, I began to reacquaint myself with the law in this matter. I may have had more to do with impeachment proceedings than anybody around here. And I heard some evidence that forced me to reevaluate my position, the evidence presented, not only in my subcommittee but over here as a manager. I have heard this thing twice. And what I have seen and heard and studied and listened to and reread and argued with my staff counsel and back and forth has only matured my conclusion that, measured by any standard, Judge Hastings' guilt has been established and Congress has an obligation to protect the integrity of the judiciary.

Whether, as for me, the conclusion of guilt tears at your soul, and it used to do that for me, should not deter you from making a decision that you will have to make. A few years ago the Congress grappled with the very question of what the standard of proof should be in an impeachment trial. Currently we choose to leave it to the decision of each Member, as it should be. So the House does not ask you to reach your decision lightly or based just on what we did or even just what your committee did.

Each of you have to review this yourself. But what we do ask is that when you weigh the evidence, you take into account the nature of the competing interests, for that is what is reflected in the concept of the standard of truth. It is the balancing of the interests of the public against those of any civil officer facing impeachment charges that is recognized by the standard of proof you adopt. So whether or not the particular catchwords make any real difference in your factfinding, the choice does have constitutional significance. In an impeachment trial, nothing short of our very liberty is at stake. For a free society cannot endure if it permits the corrupt to govern others. And that issue here is the public trust and the confidence in the officials who constitute our Government.

The penalty upon conviction is not a sentence of imprisonment. It is not a criminal adjudication; it is the removal from office. As you all know, it so happens to be the only way you can remove a judge from office. Thus, the public interests are clearly predominant over the interests of the respondent.

In American jurisprudence, the degree of certainty required for a verdict varies according to the weight of the competing interest of the parties. In criminal proceedings, it is one thing; in civil proceedings, it is another. But Judge Hastings has suggested that the strictest standard be applied. That will make it tough to arrive at the conclusions that we already arrived at, and his lawyer's reasoning flies in the face of precedent and logic. It is very interesting. They cite a Supreme Court case, *Addington* v. *Texas*, that says no such thing. Look it up.

This case started off complicated. There is no such thing. The facts are garden variety stuff. The law started off complicated. No such thing. We just do not handle impeachment measures that often in the Congress. Once you examine the precedent and the history, it is not that difficult at all by the standards of the work that we discharge every single day of the week.

The purpose, traditionally at least in modern times where officials have been accused of more than one act of misconduct, the House has included, the Senate has accepted, an omnibus article of impeachment. The purpose is not only to permit the Senate to consider whether the acts of misconduct constitute impeachable conduct in combination rather than individually. It is also a recognition of the devastating effect that a pattern of such misconduct has upon the institution, the judiciary, upon which this respondent serves. Accordingly, I urge you to conclude that Judge Hastings be convicted on article 17 as well.

You do have to study the record carefully, and you have. There is an enormous amount of evidence that makes no sense at all unless Judge Hastings conspired with William Borders and lied at the trial. It is the mass of evidence that makes the case, but it may be just one of the undisputed facts that convinces you that Judge Hastings is not to be believed on this and many, many other facts made both in and outside of this legal process.

Can anyone study this document and really believe that the judge was expecting Borders at the Fontainebleau Hotel even though when he was seated at a table for four, he watched the extra place settings removed? Everybody knows that Borders was a fight fan that night and anybody who knew, including the judge, knew exactly where he was.

Is it credible that the judge insisted that the *Romano* forfeiture order be mailed out immediately on October 6 because he was worried his law clerk was going to leave 4 weeks later? What about the judges' inexplicable behavior in leaving Washington upon learning of Borders' arrest and his gratuitous and discredited tales of telephone calls from L'Enfant Plaza to persuade the jury that some innocent reason, the concern for his mother, compelled his hurried departure?

Does it make sense that on the evening of Borders' arrest, the judge, if he were innocent, would tell Ms. Williams to leave her home and go to a pay phone to call him? Does it ring true that the judge and Borders spent months working on a strategy to help their mutual friend, Hemphill Pride, poor guy, and that their months of talking and writing culminated in absolutely no action at all? Is there any plausible source for Borders' insight or knowledge of the *Romano* case, other than Judge Hastings himself? Is this tough, difficult fact?

Is it plausible that the judge could draft six pages of handwritten letters while simultaneously trying cases without a single mistake or crossout? Those letters for Hemp are fakes, never shown to the judge's secretary or to his original legal representative, for that matter, written after October 5 to explain the coded telephone conversation that was sure going to get him in a lot of hot water.

What about Borders' choice of imprisonment rather than testify here? One Senator pointed out Borders' explicit assumption that he was being called by the Senate to testify against a friend. That is his assumption, certainly not ours.

The incriminating evidence cannot be ignored, and it is compelling. But the most compelling testimony of all came from his former best friend, quiet, unwilling, reluctant witness who did not want to say what he had to say about Judge Hastings. Yes, Judge Hastings says he was not conspiring with Bill Borders to sell justice. He and Borders were just working out a plan to help their good buddy, Hemp. They were always working out details to send letters to the South Carolina bar to get Hemp readmitted.

The only thing was Hemp did not know anything about it. The only thing was that when he found out about it, he said:

Do not do it because in South Carolina they do not like you guys advising us who should be practicing law.

And following the indictment, the judge told Hemp that he needed Hemp's testimony to support his alibi.

And you read what Hemphill Pride told the judge.

And he did this no matter how much he loved and admired or probably used to love and admire Judge Hastings.

Judge Hastings said Pride was wrong when he said that he, the judge, made no calls from L'Enfant Plaza after they learned of Borders' arrest, wrong again when he said that they never discussed Hemphill's letters while driving to the airport in Columbia, SC. Well, who are you going to believe?

Justice and the integrity of our Government depend on the importance of these impeachment proceedings, and they argue that the judge should be removed from the bench.

When he came to my subcommittee, he said:

"I'm glad I'm here. Finally, we're going to get a hearing. Let's get it on with, ready to go. You got the right place."

He put on nothing, nobody. I even called the two judges that filed the impeachment action before my committee. I even allowed the judge to make an opening statement without being subject to cross examination. I allowed the judge to cross-examine his Federal colleagues that filed the complaint against him. Read what happened. He said, "Isn't it true we disturbed the collegiality of the bench down there?" Well, you bet we disturbed the collegiality of the bench. Not one remark about racism, which is what is going to be the subtly argued problem around here. "What's a hundred white guys and women doing picking on this black judge. What do you know about it?" And nobody in this country, save maybe Jesse Jackson, has fought harder to integrate this body than me. So he is going to say, "Well, look at the system." Well, like so many in our system he came to my committee and he wanted a fair hearing and he got one. That was when the trouble started.

And by the way, there are other black judges that have looked at this case. You do not hear much about them. The first black judge in Florida at the circuit level reviewed this matter. A distinguished member of the judiciary here in Washington reviewed this matter at the conference level. The Congressional Black Caucus reviewed this matter. The Hispanic Caucus reviewed this matter. All of my friends that wanted to talk to me about it in the House of Representatives have discussed this matter with me to any point that they chose and that I could be available.

Circumstantial evidence. Well, there are so many lawyers here. What is wrong with circumstantial evidence?

And so I come to you to argue that this is not another case like Adam Powell. This is not another case like Clarence Mitchell. I happen to know something about those cases. This is not a case about Geronimo Pratt. This is the case of one Judge Alcee Hastings. There have been a lot of problems in our judicial system in which race has been involved. This is not one of them or I would be the first person in the Congress to tell you so.

I am on three committees that do mostly nothing but watch the FBI, and CIA, the Department of Justice, the criminal justice system, the corrections system, the courts, police injustice. Nobody in the Congress handles more cases than me. And so I am not here to downplay the impeachment process. I think it is an important one. It is very significant. So I join you to ask that you do what you have to do. I have done what I had to do. I have done it twice, as a matter of fact, and would do it again because I believe that this system can be made better than it is and that we are making it better than it is. So, ladies and gentlemen, do your duty.

The PRESIDENT pro tempore. The majority leader is recognized.

Mr. MITCHELL. Mr. President, I am advised that a vote has just commenced on the House floor.

Would it be agreeable to the managers that some could go and return so that we could continue the proceedings, and there could be some Members here at all times? If that is agreeable, Mr. President, then I suggest that course of action and that we continue the proceedings as scheduled.

The PRESIDENT pro tempore. Very well.

Manager GEKAS. Mr. President, will you excuse us for the purpose of casting a vote?

The PRESIDENT pro tempore. Very well. That will be done.

Arguments will now be heard on behalf of Judge Hastings.

Judge Hastings has asked to be first. Judge Hastings.

Judge HASTINGS. Thank you, Mr. President.

Mr. President Byrd, distinguished majority leader, distinguished minority leader, distinguished Senators, on both sides of the aisle:

Today, all of us are rightly concerned about the calamitous consequences in California and in South Carolina with our fellow citizens. I use California as the touchstone for any of my remarks for the reason that there is no Richter scale for the Constitution. I would like to thank each of you, and a special thanks to the distinguished members of the 12-person committee. That was an interesting summer and a lot of history is involved in what transpired there.

My range of emotions—I have these papers here that my lawyers assisted me in preparing. My range of emotions are extraordinary at this time for I have heard from three extremely distinguished Congress persons whom I have come to know as serious advocates and very capable individuals in their leadership roles in this great country of ours.

And I just question whether or not you have heard from them or read in their papers certain things that I think are going to be germane for all of us at this particular point in time. The only measurement for this kind of constitutional potential calamity is within the hearts and the minds of those of you, ladies and gentlemen, in the Senate who are going to have the responsibility, awesome responsibility, of deciding many of these questions.

I would also like to momentarily take an opportunity on the floor of this August body to thank each and every one of my lawyers that are here assembled—and there are some of them who are not here who have contributed so very much to us, and I ask your indulgence to allow me the privilege of thanking them publicly before this forum. Even from as far away as England one of our lawyers traveled today and previously when we were here to follow this constitutionally significant case and the magnitude of it so that he, too, as the scholar that he is, and my lawyers are, will have it in proper perspective.

Now, if I thought that outstanding oratory or word wizardry or ringing rhetoric, if I thought that was what was going to be the determining factor, then I would have stayed up all night long or all year long preparing same.

But I did not think that was going to be a needed item. It was not until now that I determined to dispel quickly the myth that John Conyers just perpetrated here in this body, and I do not wish my outrage to sound as if I do not want each and every one of you, as is your responsibility, to deal with the facts to do that. But I just heard Representative Conyers implicate racism into this particular situation. I have had my say on that outside this forum. I have had my say on that outside the forum when the judges were conducting their responsible constitutional irresponsible undertaking. But I invite any Senator here to look at the record of the trial of the *United States of America* v. *Alcee Hastings* in 1983 and find any notion whatsoever that racism was employed as my defense. I invite any Senator here to look at the record of the judicial council, at the judicial conference, as I believe you have, and find in there for me where race was my defense.

But, more important, your distinguished colleagues who were with me this summer, in their questioning, understanding full well the cultural differences that may exist in this country, and I believe respecting them, I invite you to look at that record from July to early August and find anywhere where I said that race was my defense. Race is not my defense, was not my defense, and when you decide this case do not decide it because an African-American is standing here; you decide it on the facts, please, Senators, please, just on the facts. If you decide on the facts, as did the jury, then I think that once you do that you will come to the same conclusion that they did.

When Congressperson Conyers said he conducted a fair inquiry I believe that he believes that he did. But I do not think he quite understands the historical magnitude of what he did when he did it. We submitted to him—and please, if there is no Senator—and I do not intend to be pejorative—if there is no Senator who does not understand the dynamics of what transpired, please go to the record and understand that we submitted witnesses for Representative Conyers to call. It was not our prerogative to call anyone we so chose. It was my prerogative to choose not to testify before his committee, and I so chose and did not. But I testified before your colleagues and to the best of my ability answered each and every question that each and every one of them put to me. But if one would believe that we gave him 70 witnesses to call and he called three of them, then I invite you to understand that a lot needs to be said.

So we have grown up, John and I. We are here today, now standing as men, and that is as it should be. And if we were to be women, that would be as it should be.

I am not guilty of having committed any crime. And that is my defense, was my defense in 1983, and has been and is, and will remain until I die, my defense.

I was not a participant in Bill Borders' corrupt scheme. The testimony I gave before the jury was as honest as I could make it, and any errors I made were honest errors, as I believe that most of the errors that the FBI made may very well have been honest as well.

I take article 17 and say one thing. I did not tell Steve Clark anything, and I believe that my lawyers will speak to that.

I said I was not guilty in 1981 before Judge Craft. I told him that we would be diving into swirling constitutional waters. Judge Craft told me, "No, Judge Hastings, this is just an ordinary case." I said, "No, it will not be, sir." And now we know that it is not and has not been.

The FBI and the Justice Department rightly, as is their constitutional responsibility when I said I was not guilty, disputed that claim. I appeared in the forum they chose and said it again in 1983 that I was not guilty. They argued that my testimony was false.

I sat here almost disbelieving. I heard three people, with the exception of Representative Gekas, arguing but one of the points. But I heard all of them arguing things that I have heard argued before. I will get back to that, and I will do all of this quickly in the interest of your time, Senators.

The jury rejected the prosecutors' argument unanimously. Never in my life have I, and as many of you who are lawyers and most of you that may have been in a courtroom—never did I see a jury, each one of them, spontaneously stand and say "not guilty" as did this jury; not required by our court system in Miami and the Federal courts, but that is what they did. I said it again this summer before Chairman Bingaman, Cochairman Specter, and the distinguished colleagues of yours that they joined—that I was not guilty. I will say it again to you now. I am not guilty.

The managers have argued otherwise. I believe that to be their constitutional responsibility. I will leave it to my lawyers to explain to the Senate why you should again reject their argument.

There is one point that I wish to address personally. The impeachment trial committee and the outside managers have questioned the absence of outrage. Why is not Alcee L. Hastings more outraged at Bill Borders for what he did to him? And I heard it raised here again today before you in this distinguished body.

Well, would it surprise you to know that nobody ever asked me that until I got to the trial impeachment committee? That was never put before me to be said. Then I said what I had to say. That is in this record. But so we will not have it misunderstood, I am and will remain outraged by what Bill Borders did, and stealing my name, but that outrage has since been joined by other concerns that might be called outrages, and let me describe just a few of them to you. I would like, if you would, to go to the record with reference to them.

I was and I remain concerned by the FBI's decision that my honor and my integrity, my innocence, and my reputation were not worth 125,000 American dollars. They knew the case against me was insubstantial. Not only that, they knew it was shaky. When they decided to arrest Bill Borders at the scene of the payoff, and they now claim that protecting the integrity, the reputation, the innocence, the life of a district judge who, in this instance, just incidentally is named Alcee Hastings, was not worth $125,000, was it that the honor and integrity of a Federal judge was not worth $125,000 or was it just the honor and integrity of me? You can answer that.

I was and I remain concerned that a horde of FBI agents, 11 of them, to be exact, went to my chambers on October 9, 1981, with a subpoena *duces tecum* and seized whatever papers took their fancy on that day. The very idea that FBI agents should invade the chambers of a Federal judge, and when they discovered that neither he nor his secretary were present, rummaged and helped themselves in his office under the aegis of a subpoena *duces tecum* causes genuine concern.

That does not get around those core facts. I was and I remain concerned that two judges—so as how you all clearly understand, those two judges were not colleagues of mine from the Southern District of Florida, as has been so often misrepresented in America since this instance began.

Those two judges—I was tried in Miami, FL. One of them is and was the chief judge of the Middle District of Florida. The other one was and is the chief judge in Brunswick, GA. Neither of them were at my trial.

There was daily copy at that trial, and neither one of them had the benefit of the record. Please go to the complaint and read it, and you will find they attached newspaper clippings as the basis for their information and belief. Those newspaper clippings, as the basis of their information and belief, led to 3½ years of investigation. That also causes me concern, as I believe each Senator in this room and each Member of the House of Representatives rightly should be.

This committee did not even bother—they talk about Hemphill Pride as my friend—to get his telephone records. When we tried, we were unsuccessful, and the record bespeaks that. For 8 years, Senators—or 3 or 4—I am the only person in the history of America standing here that all three branches of government have had an active and hands-on responsibility in seeking to remove.

For 8 years, the only issue has concerned my guilt or my innocence. For 8 years, no one has cared about the conduct or misconduct of those who have accused and investigated this Federal judge.

Eighteen months, two able lawyers, the resources of the FBI, and a jury verdict were not enough. The issue required more, more than 6 years, six outstanding lawyers and their aides, untold millions of dollars more.

Now, for 8 years—we enter the ninth—no one has cared about the physical and emotional consequences to me or to my family, and no one has cared, it does not appear to me, about my colleagues in the Southern District of Florida, who are in desperate need of additional judge power at this time.

For 8 years, no one has cared about whether it was fair to impose the costs and burdens of three investigations and two trials on an acquitted Federal judge.

I was outraged in 1981 and in 1982 when I learned what Bill Borders had done to me, and I am outraged about it now. That outrage is ongoing, and will be forever, and is joined by other things that have happened to me during this 8 years.

The Senate has the power to make a just decision this week, and I believe they will. The Senate also has the power to exercise fairness, and I believe they will.

I want to share with you something, Senators. The question was put by the trial committee, and has been an overriding concern, as I am sure it is for all of us, and that is the subject of what deference, if any, in your deliberations, you should give to the jury verdict in which I was found not guilty in Miami.

On Tuesday, the second week of the proceedings before the outstanding impeachment committee—and I thank them for all of their time and attention, recognizing the size and complexity of their responsibilities as well as yours—on that second Tuesday, I sat there and made sort of a bond, at least in my mind, and spiritually, with Mr. Madison and Mr. Jefferson and Mr. Franklin, and other persons who helped author our Constitution and the Federalist papers.

I have heard Terry argue and Robert argue and Stephanie and Patricia, and all of my lawyers argue the constitutional ramifications of double jeopardy as pertains to this matter. I read James Kilpatrick's columns regarding same, as I am sure some of you have.

We have argued humorously and seriously from the legal and philosophical standpoint. All of my life, I always thought as a lawyer that the reason the double jeopardy clause was placed there was because the Founders were capable of seeing that things would happen that would cause people not to have to suffer that pressure. I believe that I am the only individual in this room that has had to undergo that pressure.

You know what, I believe that Mr. Madison and Mr. Jefferson and Mr. Franklin had had that same experience in their lives, and that is why I believe it is in the Constitution. I have borne that burden, and I come to you asking but one simple thing: Fairness. Please, act fairly.

Thank you, Senators.

[Clapping in the gallery.]

The PRESIDENT pro tempore. The guests in the Chamber are the welcome guests of the Senate. The rules state there may be no demonstrations of approval or disapproval in the galleries. The Chair intends to enforce that rule and hopes that the visitors in the galleries will cooperate with the Chair in maintaining order throughout the trial.

Thank you, Judge Hastings. Ms. Williams will now continue the argument.

Ms. WILLIAMS. Mr. President, distinguished Senators, House managers, my very capable colleagues, let me also express my appreciation to the Senate for this opportunity to come forward and argue the defense of article XVI on behalf of Judge Alcee Hastings.

October 9 marked the ninth year since the onset of the mega-dilemma of Judge Alcee Hastings. Only a strong, determined individual who believes in himself and is committed to his principles can withstand for 9 years an unrelenting attack on his reputation, manhood, his sense of security in his country, his peace of mind, his health, his financial well-being, and his general pursuit of happiness for that long a period of time.

But Alcee L. Hastings has not only withstood that attack, but he has stood up to it with integrity and with dignity.

Judge Hastings long ago recognized that his problem was bigger than he is, and at some point he became committed to standing up to protect not only himself, but to protect precious constitutional principles such as separation of powers, double jeopardy, and the independence of the Federal judiciary.

My task this afternoon is to sum up the evidence and to argue same as pertains to article XVI which alleges that Judge Hastings leaked confidential wiretap information to Mayor Stephen P. Clark in Miami, FL, on September 6, 1985.

Article XVI, though factually unrelated to the previous 15 articles, nevertheless sheds light on those 15 articles and provides some insight into the mind and motives of the accusers of Judge Alcee Hastings.

Article XVI is based on a set of facts which never link up. They never make sense. They never could have happened. Yet, it is here before you today.

How that came to be, that we are here today on article XVI, is a question as important as whether or not the judge leaked confidential information to Mayor Clark.

I ask that you hold both questions in mind always as you deliberate on article XIV. These are the facts. Mayor Clark was given an award and Judge Hastings was the guest speaker at a MAPP convention in Miami on September 5, 1985. Mayor Clark has testified before the grand jury in Miami, before the Investigating Committee on the Eleventh Circuit in Atlanta, before the House subcommittee, and before the Senate subcommittee that after Judge Hastings gave his speech, the judge stepped down from the podium, went into the audience, shook the hands of various members, worked his way back to the third row and there whispered into Mayor Clark's ear the famous phrase that Mr. Gekas has voiced over and over again, "Stay away from Kevin Gordon, he's hot, he's been using your name in Hialeah."

The mayor testified that, after the judge put this in his ear, he then left the MAPP convention momentarily, drove to his office 5 or 6 minutes away and called Peter Ferguson, Clark's campaign manager and a political associate of Clark. Clark told Ferguson to call Kevin "Waxy" Gordon and tell him that the mayor wanted to meet with him at noon or so at the club, as Mr. Gekas has pointed out.

This often repeated set of facts is what I earlier told you simply could not have happened and never links up. By all accounts, by the testimony of all the witnesses who testified before the subcommittee, the judge's speech ended after 9:30 in the morning and probably ended about 10:15 that morning.

The FBI intercepted Ferguson's call to Gordon, which Ferguson made as a result of Clark's call to Ferguson at 8:58 in the morning, long before Steve Clark says he had any contact whatsoever with Judge Hastings, long before Judge Hastings had even commenced his speech, let alone thereafter walked into the audience and greeted Steve Clark.

In addition to that, the evidence further establishes that it did not happen the way Steve Clark said through the testimony of Joy

Royals Vickers. This young lady came in and testified that at the MAPP convention she was assigned the task of bringing the judge down in time to give a speech and of making sure that he concluded it at such a time that he would be able to get out of the convention and to the courthouse in order to resume a jury trial that he was in. She testifies that at some point she came onto the dais, stooped down next to the judge at the podium so that she could not be seen in the audience, and started tugging on his coattail to alert him that it was time for him to conclude his speech. The judge concluded his speech. He greeted certain people on the dais. She then directed him out of the auditorium, through the rear doors behind the podium. She says the judge never stepped down from the podium, he never went into the audience, he never greeted anybody there, he certainly did not greet Steve Clark at that time.

Pat Thomas corroborates Ms. Vickers' testimony. She testified she assigned this task to Joy Royals Vickers, so does Lonnie Sumpter and one other witness, Roy Phillips, who says that he was coming onto the dais, which can only be exited and entered from the end of the dais where the steps are. As Roy Phillips was coming onto the dais in order to greet the judge and congratulate him on his speech, he saw Joy Vickers take the judge through the back doors and out of the convention. As I said before, it could not have happened the way Steve Clark says it happened.

At some point Steve Clark was confronted with this inconsistency, and his response, contrary to what Mr. Gekas says, was, "I cannot explain it." He had no explanation for the inconsistency. The story that he told he has told over and over again, and he has never attempted to provide any explanation for the time inconsistency. Further, when he was confronted with the possibility that the judge may have made the statement to him when he was speaking with Monsignor Walsh that morning—and let me backup one moment, if I may.

It was Judge Hastings who produced Monsignor Walsh, it was not the committee, it was Judge Hastings who did that, and he did that because he recollected that he had in fact seen Steve Clark on this morning at the MAPP convention and that, when he did so, it was in the presence of Monsignor Walsh. Monsignor Walsh says that there were no private conversations between Steve Clark and Alcee Hastings when they had that little encounter on that morning. He said it was just an exchange of cordiality, "Good morning, how are you? Is the coffee good?" That kind of chat. He said there were no private conversations. He never saw Judge Hastings take Steve Clark over to the side and whisper anything in his ear. He never heard anything about "Waxy" Gordon or anything along those lines.

Steve Clark says that he does not have any recollection of Monsignor Walsh at all, and he denies, contrary to what Gekas says, he denies that it was at that time that the judge made the disclosure. I repeat, it did not happen; the story is not true. It does not link up. It makes no sense.

What does the FBI do faced with an obviously untrue story? Well, they gnawed apart what did not fit a scheme of guilt for Judge Hastings, and they proceeded to try to make a case.

First, they confronted Clark, and they said to Steve Clark, "We need you to make contact with Judge Hastings. Give him a call on the telephone, and we will record the conversation. Or visit his chambers wearing a Nagra tape. Have lunch with him at some restaurant he frequents."

They made all these suggestions to Steve Clark, to which Steve Clark responded "No, no, no." He would not do any of them. Why would he not do it? Steve Clark has never called Judge Alcee Hastings in his life; neither has Judge Alcee Hastings ever called Steve Clark. It is not that kind of relationship. When they meet, it is under circumstances just like the one that I just explained to you, on a dais where they are both guests at a political or civic function of some sort in Miami.

Steve Clark has never been to Judge Hastings' chambers or to his home and neither has Judge Hastings been to Steve Clark's office or his home. They do not drink together. They do not know each other. There was no way.

The FBI scheme was a very intelligent one, I do believe. What they wanted to do, according to the FBI Telex was have Steve Clark sort of bump into the judge, sort of accidently, and then to thank the judge for the tip and to tell him that he checked it out and it was true, and then the judge's response would one way or the other reveal whether or not the judge was involved.

So Steve Clark refused. He would not do that. He said he had a heart condition and that his doctor said that if he wore this Nagra tape, he might incur some kind of a physical problem. But, as I told you, Steve Clark testified before the grand jury, the Investigating Committee, the House subcommittee, and the Senate subcommittee here, and I wish you could see, I hope you have time to go back and watch that testimony. The truth is in the watching of Steve Clark.

And there has never been any documentation from any source of any position of Steve Clark saying that he was so desperately ill that he could not accommodate the FBI's very, very reasonable request which may in some way have put an end to this nonsense that we are here on today.

Now, did the FBI find it strange or suspicious that Clark would not assist them in any way? No, they did not. Instead, they made a decision to take Steve Clark before the grand jury.

Now, this is a little bit bothersome because you, in reviewing the evidence, will find a Telex from the FBI where they had made a decision on March 3, 1986, that they would not take Steve Clark to the grand jury. And what they said is that they would not take him to the grand jury for the purpose of locking Clark into his testimony.

We contend that they had a subsequent decision and when things did not go the way they needed them to, they then decided that all they could do was take Steve Clark to the grand jury for the singular purpose of locking in his testimony. And that is not what grand juries are about. Grand juries are not about locking some people into testimony. But that is the sole purpose for which they took Steve Clark there.

We received the House subpoena and did receive the grand jury testimony of the Steve Clark matter. There is the testimony of agent Mazzella, the FBI agent, and there is the testimony of Steve

Clark and that is all there is. There is no request by any prosecutor at any time for an indictment against Judge Alcee Hastings. Never asked for one. That is why there is no indictment nor no true bill. Nothing. They went into the grand jury solely to lock him in and they did. And that is why four times around, in spite of a glaring inconsistency, Steve Clark continues to tell the same story that he told under oath before the grand jury, he has no choice, or face perjury allegations.

Now, the House did not investigate whether or not there were any other possible sources of this information having reached Steve Clark. Let me bring to your attention very quickly—I have a time problem here—that in July 1985, when we got the discovery evidence from the House, we found information there from the FBI which revealed that in July 1985, a call had been made to a Tom Dowd at the FBI, inquiring whether or not there was an investigation ongoing about Steve Clark and Ferguson regarding Hialeah zoning problems.

Now this was in July, which was a month to 2 months before Judge Alcee Hastings knew anything about a wiretap. So somehow this information was already being leaked, but this was never investigated until we came up here before the Senate and we called Glen Whittle, who made that call to Tom Dowd. And what we learned was there was a nice little clique, a little group, or, as Terrence Anderson refers to it, FBI groupies that consisted of Steve Clark and H. Paul Rico, who was the guy who played Frank Romano, the undercover agent who played Frank Romano in the bribery allegations.

Steve Clark played golf with H. Paul Rico and Tony Amoroso, who was the supervising agent on the operational file. These persons were golf buddies. Every weekend they played golf.

Steve Clark married Tom Dowd and his wife, and she worked for H. Paul Rico. There is all this little cliquey, little group thing going on here. Steve Clark had sources for information that had nothing whatsoever to do with Judge Alcee Hastings.

I would like to just take a few more minutes to ask you to take a look at how article XVI comes before you today. They went to the grand jury. That did not work. There was no indictment. The Justice Department declined to prosecute on the case, setting out essentially that they did not think there was a case.

The FBI nevertheless pushed, pushed on this matter and a complaint was filed under the Judicial Conduct and Disability Act alleging this very same matter. And then, somehow or the other, by osmosis or whatever means, it appeared before the U.S. House of Representatives.

Now I wrote to try to find out how that matter got over to the House and John Conyers did not respond to my letter and neither did Alan Baron, just informing us as to how it got there.

The problem that I wish to point out to you before I sit down is that I do not believe that this act was intended to be used this way. Twice it has been used this way against Judge Alcee Hastings; in their failure in the court, as there was with the acquittal in the bribery matter. Then a complaint was filed under the Judicial Disability Act.

When there was no court action taken or declination or no indictment, then a complaint was filed on the Judicial Disability Act. I do not believe that that act was designed—and you ought to know much better than I—in order to give second whacks at Federal judges when you are not able to get them in the Federal court. But that is how it is being used.

And I do not believe that the two judges who filed the complaint against Judge Hastings after the original bribery allegation intended to instruct the executive branch that if you fail in court you can always file a complaint under this act and stretch a judge out to the point of no return, until sooner or later you have him where you want him to be. But, that is a fact, the situation that we are faced with today. This allegation makes no sense, actually makes absolutely no sense, but here we are on it before the Senate today.

I would like to just very, very briefly make one comment regarding Roberto Martinez, who, according to Mr. Gekas, was a prosecutor who formed a distrust for Judge Hastings. And he did. He certainly did. But he did it based on a lack of knowledge.

When informed as to the time inconsistency, when informed about the witnesses who came forward, he said it could not have happened; he knew nothing whatsoever about that at the time that he formed his impression that the judge could not be trusted.

And I defy Mr. Gekas or anyone else from the House managers—Mr. Gekas said there were others that came forward and said they did not trust the judge. Tell us who that was and point to the record, anywhere in the record, and show us any judge or lawyer other than Roberto Martinez, who was informed, who came forward at any time expressing any problem regarding Alcee Hastings as a judge capable of being trusted.

The bottom line is is you have Steve Clark's word versus Alcee Hastings, Joy Vickers, Lanny Sumpter, Pat Thomas, and Monsignor Walsh. That is what you have, a credibility problem here, a problem of who do you believe. What makes sense? And Steve Clark's version makes no sense.

Thank you very much.

The PRESIDING OFFICER. Thank you Ms. Williams.

Professor Anderson will now conclude the argument for Judge Hastings.

Mr. ANDERSON. Thank you, Mr. President. This is the 10th time the Senate will be called upon to pass a judgment on a Federal judge. On the nine previous occasions—several can be discounted: Justice Chase was a Supreme Court Justice, Alcee Hastings is not; Pickering was arguably insane; Humphreys was during the Civil War and had gone over to the South; and Judge Claiborne was handicapped by a jury conviction.

When you get down to the five fought-out cases, you have five cases in which, every time the House managers, as is their constitutional duty, have come over and told this body the evidence was overwhelming, this man is guilty of an offense, it is an offense that requires he be removed in the name of judicial integrity.

You have rejected that four out of the six contested times. I say this not to raise an institutional defense, for Judge Hastings' defense is his innocence. I say it to remind you that there is a distinction between the role this body must perform and the role that the Constitution assigns the managers.

Mr. Bryant has emphasized that Bill Borders was convicted by a jury that must have found beyond a reasonable doubt that there was conspiracy, and in that instance he is correct. He has emphasized that a body of judges who took evidence certified that the evidence of Judge Hastings' involvement was clear and convincing, and in that he is correct. He has emphasized that Mr. Conyer's subcommittee heard evidence and decided it was clear and convincing and merited prosecution; probable cause was there.

What has not been emphasized is the jury that heard the evidence in Bill Borders' trial did not hear Alcee L. Hastings. They saw the circumstantial case without explanation, and no one has ever disputed the evidence of that; Bill Borders' participation was direct, not circumstantial.

The judges gathered the evidence and marshaled it against Judge Hastings and found probable cause to proceed. The House subcommittee heard 8 witnesses to summarize the case that it took 26 witnesses over here for them to present.

This is a man who has been found guilty by those who have heard him not, and who know him not. This is a man who was acquitted by a jury that heard the evidence on both sides. This is a man who the record before you, witness after witness after witness, tells you is a man who is believed in in his own community.

This is a man, Judge Matthew Perry, Judge Rogers, Jesse McCrary—these are men who have known him all their lives. They come forward and say: We believed in him then. We believe in him now.

More to the point, Neal Sonnett, the president of the National Society of Criminal Defense Lawyers, member of the American Bar Association House of Delegates, attorney for the Romanos on appeal, a former Chief of the Criminal Division in the U.S. Attorney's office in the Southern District of Florida, a man who has lived with this case almost as long as Alcee Hastings, Neal Sonnett has studied the matter; Neal Sonnett continues to believe he is innocent. But Neal Sonnett cares because he is satisfied with the jury verdict, and he regards this man as an outstanding district judge before whom he has confidence in appearing.

Marty Raskin, the Chief of the Criminal Division in the U.S. Attorney's office in the Southern District of Florida in 1981, an outstanding judge said:

> I have been trusted with and tried for the Government cases involving sensitive information. I have absolute confidence in his integrity. I, today, and senior practitioners in the Southern District of Florida, remain confident in his integrity. We are content with the jury verdict. We are not content with the FBI's decision to arrest that man, Borders, when no money had ever gone to Judge Hastings and thereby create a circumstantial case.

But, let me confront Mr. Conyers and the overwhelming evidence the House has presented, for I submit to you the evidence, far from being overwhelming, supports on balance the judge's innocence. The morning of Saturday, September 12, William A. Borders met with H. Paul Rico, playing the role of Frank Romano. William A. Borders and Rico-Romano cut a deal that had two shows of proof. One, the judge would have dinner at the Fontainebleau the following Wednesday. The judge did and that is suspicious. Two, on or before September 29, 1981, the judge would issue this order restoring a part of the property.

It is not disputed by anyone that the order the judge issued was compelled by precedent. As the impeachment trial committee well framed it, the only issue is: Was the judge holding the order back to give the Romanos a chance to make a deal? And did he issue it as a show of proof? There is no question, this was not part of the bribery. There has never been an allegation he issued that order as a part of the conspiracy. It is only its timing.

Bill Borders promised Rico-Romano that order would be issued on or before September 29, 1985. He promised it on September 12, within 10 days. He came back and collected his down payment on the 19th, and said, "Ten days".

Rico-Romano said, "ten days from the last time we met?"

"No, no, 10 days from Friday. It is not a big difference; by the 29th."

So, firm was the promise they agreed they would meet on Saturday, October 3, at the Miami International Airport for the final pay off.

Rico-Romano said, "I will know something by then, huh?"

Borders: Yes.

September 19 was a Saturday. The judge—there is nothing in the record—the judge says that he and Borders had a telephone conversation on the 20th—21st. In the House's theory, the judge, by that time, knew what the deal was. You do not have to look at the judge's testimony, although you should. Look at his law clerk's testimony. Monday, September 21, did the judge tell you to get the order out? Tuesday, September 22; Wednesday, September 23; Thursday, September 24; Friday, September 25; Monday, September 28? No.

This man is alleged to be involved in a conspiracy where he has to do but one thing, tell his clerk to get an order out. When the clerk was finally instructed on October 5, it took him 1 day. Had the judge given that instruction on September 28, or any day prior to that, it would have been over.

The show of proof was the timing and it was not there. That is a question the House has never been able to answer.

You have a concern, what is the standard of proof. Here is a doubt; a big doubt. What do we do with that?

Well, I want to create more doubt. I want to create a lot of doubt. I want to satisfy you that there is nothing in those five volumes that is clear, little that is convincing, and less that is unequivocal.

But you have this one gaping doubt, and hold on to it. Bill Borders promised, as a show of proof, the order would be out the 29th. It wasn't.

But what do we know about the history of the *Romano* order? Does the evidence enlighten us as to how it happended? What we know is, on May 4, 1981, Judge Hastings entered an order directing the forfeiture of $846,000 in cash and an interest in a motel. At that time that order was consistent with precedent. On June 19, while a motion to reconsider was pending, the U.S. Court of Appeals handed down a decision known as *United States* v. *Martino.* For Judge Hastings's circuit that decision construed the law and said: Cash proceeds aren't reachable, under the RICO Forfeiture Act.

That was briefed with the last brief being filed on July 6. It is undisputed, and I take it undisputable before a body such as this, that briefs and memoranda and slip opinions that come into a Federal judge's chambers are routed automatically to the judge responsible for the case. Jeff Miller was the clerk for even numbered cases. These things do not go to the judge. They go to the clerk. They go to the clerk for a workup when the clerk has a proposed order or memorandum or recommendation. Or when the judge is going to have to hear it, then they go to the judge. Miller's testimony, the staff testimony, that is business practice, that is established.

Look at the judge's calendar for July 8, that is the day the Romanos were set for argument on motions, and sentencing. Five matters that morning, two sentencings at 10:30, the same time, Romanos and one other.

A hearing, in the case which has been dragged into this thing, *United States* v. *Accardo.*

What does Mr. Miller say? "Minutes before the judge went on the bench I handed him a handwritten memoranda addressing this motion, other motions that were pending."

He did not have time to read the *Martino* decision. Nonetheless, as there may have been, within Congress and among other judges, Judge Hastings is a quick study. He took the bench; he heard argument; he pushed counsel. He heard arguments on all the post-trial motions, including the *Romano* order, and at the end of it, he flat out denied a motion for a new trial.

He said, "I'm going to deny your motion to reconsider the forfeiture and let it stand, but I will issue a brief order that takes account of these new decisions." And he proceeded to sentence the Romanos to imprisonment, what Mr. Deichert the prosecutor, argued and precisely what the probation office recommended.

Mr. Miller, not Judge Hastings, said, "After the hearing the judge told me he wanted the order to stand by the original forfeiture. I understood that is what he wanted, but I understood him to say if it could be done consistently with the law."

Mr. Miller has never waivered in that view, and he, too, has testified before grand juries and Mr. Borders' trial, Judge Hastings' trial, before the Investigating Committee, now the House, and before the Impeachment Trial Committee. He never waivered. Mr. Miller, the young lawyer, now not so young, who in 1981 sat down to try and draft an order and he could not distinguish *Martino.*

You have the draft order. It was done by the end of July. The best he could do was come up with a conclusion that would have called upon the parties to submit additional briefing on a possible distinction.

> Mr. Miller: I never gave it to the judge. I put it aside. I got caught up in other matters in August.
>
> Judge King: This is the busiest district court in the country.

These are judges who even after the expansion of the bench still have to hear 50 jury trials a year.

A case, which part of the docket is in your record, involving the Haitians came in and was heard, an emergency thing trying to affect the Government's right to exclude Haitians who come over on boats. This is a court where emergency matters crop up. This is a court where criminal trials to determine guilt or innocence take priority, where emergencies take priority, where orders, drafting, and hearings are secondary. Jeff Miller said: "I have to put the order aside. I did not give the draft to the judge."

August 27, 1981, the Court of Appeals hands down a second decision, *United States* v. *Peacock*. The court reverses the district judge for failing to follow *Martino* and says that will remain the law of this circuit and is to be followed by all district judges unless and until this court sits to decide on bond or the Supreme Court reverses it. Follow it.

Mr. Miller, by his reputed account, called that to the judge's attention in early September and in that conversation, the judge said, "All right, give them their money back, but make sure my order reflects my disagreement with the Court of Appeals." That conversation, by all accounts, took place prior to September 10, prior to the day when the Government cut its deal with William Dredge, prior to the day when Dredge called Borders and said the Romanos are ready to deal. Why, if Judge Hastings was delaying the order waiting for a deal, did he tell the clerk to draft it before the deal was on? I have heard the suggestion that Mr. Dodge, in the background, may have been trying to persuade Mr. Borders on deals just down the pike and maybe the judge was confident that a deal was coming, as one explanation as to this inconsistency.

I submit to you, if you take that view of it, you cannot avoid September 29. If this was a judge who anticipated the possibility that maybe we will get a deal—Jeff get on it, draft the order—and if he is doing that before September 10, why did this judge, no date, between September 10 and October 5th go back to the clerk and say, "Where's the order?" This punctual man could have said to Mr. Miller, "I want the order on my desk on September 12." Then he could have sat on it. He could have waited until the moment was right if he were involved in this deal. He did not.

It is inexcusable to say, it seems to me, that here is a man who Bill Borders could make go to the Fontainebleau, but here is a man who Bill Borders could not even ask his clerk to get an order out on time. Here is a man who is seeking $150,000? What is the explanation? He forgot. There is no evidence, and that is Jeff Miller in chambers, pressured by the judge to get the order out. The only evidence you will find is pressure from the Government to Mr. Miller, but that did not work. That is, I think, a gaping hole. It is a hole that the Government should have been aware of. Judge Hastings' defense is innocent but bears upon the dual responsibility you have here to protect the independence as well as the integrity of the judiciary, to examine now what happened in the face of that knowledge.

Look in your exhibits. There is a telex dated September 23 from the FBI plotting the balance or describing the balance of its operation Apple Eye scenario. At that time, the FBI knew that Bill Borders had met with Rico-Romano and promised at the Fontainebleau the order. They knew Bill Borders met with Rico-Romano on the

19th and taken the $25,000, promised the order would be out on September 29. They wanted a wiretap at that point because Mr. Weingarten, the Justice Department prosecutor, had some reservations that even with two shows of proof, even if the judge did issue the order by the 29th, it might not be enough to go after a Federal judge. They wanted the wiretap so that Mr. Rico-Romano could call Bill Borders and have some questions about the order that might provoke a call to the judge so they might get something.

Asked of the evidence, why when they did not even get their second show of proof they decided to roar ahead and arrest Mr. Borders at the scene of the payoff when none of the money had ever gone to the judge? Let me confront these patterns of communications in this admittedly crucial period. The order did not come out on the 29th. There is no evidence at all of any communication between the judge and William Borders from September 21 until 5:12 p.m. October 5. Yes, a receptionist in Mr. Borders' office on Friday, October 2, 1 hour and 40 minutes after Rico-Romano's call to Borders called Judge Hasting's office. We do not know who she called on behalf of. See did not say. The judge was not there. We know only because this honest man reported that Bill Borders called his home and talked with his mother on Sunday. We know for a fact that the judge was at the Sonesta Beach Hotel attending the meeting of the Florida chapter of the National Bar Association that weekend, and he was not home.

We have a recording of a call between Rico-Romano and Mr. Borders at 4:12 in the afternoon when Mr. Borders says, "It has been taken care of; your friend should tell you." We have no record, with the resources of the FBI, a court authorized wiretap, no record anywhere in the long distance records of any call, communication between Alcee L. Hastings and William Borders from the date of Rico-Romano's first inquiry until the time of the call when he says it has been taken care of.

The first contact we have comes 50 minutes later, and that is the letters-for-Hemp call. That is how you generate suspicion in a circumstantial case.

Let me take up Mr. Bryant's challenge and ask you to refer to the text, which I am told is before you, of that conversation. What is the evidence? Judge Hastings opens up and says I have drafted all those letters for Hemp. According to the judge, Borders has been pestering him to draft two kinds of letters: One letter soliciting to raise money for their friend who was in distress and the other to get character references. The fundraising is the one that caused the judge ethical problems.

The evidence is clear that Mr. Pride says he was in desperate financial straits. He had been convicted; he had been sentenced to jail; he had just emerged; he had judgments and they were going to have to be dealt with before he could seek readmission. The evidence is consistent. Mr. Pride testified that Bill Borders and Judge Hastings had done things on his behalf without clearing it with him or talking with him before. But that at least is the judge's statement as to what the trigger was. According to the judge during the day, he had written out some drafts—three drafts: One proposed draft letter soliciting funds; a second proposed draft letter for character references; and a third draft cover letter transmitting the two proposed drafts to Hemphill Pride asking for his approval.

Examine the conversation, if you would, with me, in that light.

> I drafted all those letters for Hemp and everything is OK. The only thing I wonder, I was concerned with, was did you hear, you hear from him after we talked?
>
> Yeah. See, I had talked to him and he wrote some things down for me.

Measure it from Alcee Hastings' standpoint. Hemphill had gone through Washington and had stopped and chatted with Borders in September. Hemphill Pride admits he was calling Judge Hastings and Borders regularly from the time he was released from prison onward. That was a plausible explanation: He wrote some things down for me about his financial condition. And then I was supposed to go back and get some more things, more information.

That, if you are embarking on a campaign, is consistent. But they take umbrage: "Oh, no big problem."

Then I will send the stuff off to Columbia tomorrow.

The stuff is the two proposed drafts, not completed drafts, with a dollar sign in the money blank that is to be sent off to Columbia tomorrow to Hemphill Pride to review. That is the judge's understanding.

Now, you can listen to Roger Shuy, if you want to, and say this is a linguistically peculiar conversation, and it is. But let me now challenge the House's evidence and explain to me how this conversation can be interpreted as a conversation about the *Romano* order. Focus with me on the passage to which Mr. Bryant called the Senate's attention:

> See, I had talked to him and he wrote some things down for me and I was supposed to go back and get some more things.

This is 5:12 on October 5. According to the explanation, as I understand it, Mr. Borders is telling the judge the deal is still on track by telling him he wrote some things down for me; that is, I picked up the downpayment. And then I was supposed to go back and get some more things; that is, the payoff. If Judge Hastings was a participant in this conspiracy, he knew that on September 12 in the House's theory. He knew by September 12 that the downpayment had been paid and that Borders was supposed to go back on October 3 and get the balance. If the inquiry was, is the deal still on, it calls for some more information than last week's news: I went and got the downpayment. I was supposed to go back and get more things. Yeah, I know that. I am asking you, is the deal still on.

Indeed, if the House is correct, there is an undetected conversation between Sunday, October 5, and 4:22 p.m. on Monday between the judge and Mr. Borders.

The information is current in the judge's head about everything except the other recorded call you have between Rico-Romano-and Mr. Borders. Explain this passage to me as sensible commentary on the state of Judge Hastings' knowledge if he had been a participant. Hear me explain, whatever the linguistic peculiarities, that conversation in light of the judge's testimony. You may not be happy with the "ah's" and the "Um's" and the repeated pause fillers that so trouble Mr. Shuy, but the judge's explanation is the only one that conforms to the evidence. This is not evidence that comes at the wrong time and it does not explain anything in the purported bribery scheme.

But, Mr. Bryant, if I understand him, would take us beyond that. He would talk about the pattern of contacts. Let me talk about the pattern of contacts for here, as your Impeachment Trial Committee correctly noted, I become concerned about telescoping; I become concerned about remarshalling the data.

You have heard one view today of a story that gets changed every time the evidence cannot be made to fit. Originally, the story of Mayor Clark was after the speech the judge told him. That never quite worked. But when the judge brought Monsignor Walsh forward and said, "Oh, yeah, I saw him before," it is now, here is a man who said after the speech, but we are going to make it a circumstantial case that it occurred before.

That is what happened here time and again. On each retelling this evidence gets a little more refined to see if we cannot squeeze out two more explanations by the judge and pump up one more event.

But let me look at the events that have been pumped into the 1980 version. The House identifies 19 contacts that are grounds for suspicion. The National Bar Association Board of Governors and its judicial council were scheduled to meet in Miami Beach from February 26 until March 1. On February 20 Judge Hastings called Bill Borders and they talked for 2 minutes—3 minutes or less. The judge was scheduled to be the keynote speaker. Bill Borders was President of the National Bar Association. The judge had planned to host a reception. He called Bill Borders and the two men spoke for 3 minutes or less. I submit if he had not called Bill Borders, that would be grounds for suspicion. But it did happen, when we went back and looked at the docket, that there was an evidentiary hearing in the *Romano* case on the forfeiture issue that day. Juxtapose, the House would ask you. But let me ask you, if you are juxtaposing, to listen to one of their other arguments and play it my way.

We have heard about inordinate delays in sentencing, decisions, issuing orders. I do not know, and the judge does not know, but I appeal to your common sense, do you really believe, to borrow, Mr. Bryant's form, that as of February 20 Bill Borders was reaching out to bribe the Romanos and he was still persisting 7½ months later?

I do not know how rainmaking works, but my strong hunch is if a crook tells you no the first time, you back away quick, because he just might sell you for something. We have a 7½-month set of negotiations going on here. That is the 1980 version.

The 1983 version had it beginning on or about September 10. But when you have to redo it, you have to relook at the data and see what else you can find, and we have February 20. We have April 9. What is the evidence before you? You have a message slip in William Borders' office log saying the judge called that morning and said, "In office between 12 and 1." You have two message slips saying Hemphill Pride called Bill Borders that day. And you have a long-distance phone call from a pay phone outside the judge's chambers to a pay phone in the D.C. Courthouse which the judge charged to his home phone number which is why you know about it. That is your evidence.

Now, there are lots of possibilities in that evidence. One, we know as established fact that Bill Borders used pay phone conversations out of some form of eccentric paranoia with prominent officials who had never been suspected. Andrew Chisholm, the Director of Minority Affairs for the Carter campaign in 1976, Bill Borders used to call him and say, "I am using a pay phone. I think you should, too." Delano Stewart, a Florida lawyer. It is there in the record. This was one of the man's eccentricities, and it did not make other people suspicious.

So it is possible, even though we have no record, that at some time shortly after 12, Bill Borders called the judge, and it is possible that the judge, when he called, was calling Bill Borders at the courthouse. The call lasted a minute or less. And you should understand that 1 minute is the minimum billing unit. If I call and get your son, who says, "The Senator is not home," and I say, "Thanks," that is 1 minute. All you know from a minute call was there was a connection. But if you are willing to put together the message in Borders' message log with the long-distance call and assume that there was an intervening call and that the judge went out and called William Borders rather than someone else at the D.C. Courthouse, and that Mr. Borders was there to take the phone, and that the two men talked for a minute less, you are now at the point where you have established a circumstance that we can reason with.

So now let us assume as proven fact, as the House would have it, that the judge talked to Mr. Borders. What did they talk about? Well, you have the two messages from Hemphill Pride. Then Mr. Bryant suggests that I cry a lot about missing evidence. I do not have Hemphill's phone records. I do have his testimony: I was calling the judge and Bill Borders regularly after my release from prison.

I would like to know whether Hemphill Pride had called Alcee Hastings April 9 or the day before. I would like to know whether he got through to Bill Borders April 9. I would like to know what is going on there. The records have been destroyed. They are not part of what the judge's accusers chose to say. But the House would have you believe major events in the *Romano* case are to be juxtaposed.

Let me talk about nonsense events. On April 8 the last memorandum of law was filed on the forfeiture issue.

That memo went routinely to the judge's law clerk. That was a piece of paper. It was a brief. The judge did not have that issue for decision until May 4. Had the judge intervened in his business practice and pulled the *Romano* file out, it would have been noticed.

It is almost inconceivable that a judge on the busiest district court in the country would be aware of the fact that a lawyer had dropped off a memo, and it had been plunked in the clerk's box. You can speculate the possibility is there. But this is the danger of after-the-fact marshaling of the circumstantial data.

There were 17 events in this period in the *Romano* case. There is a series of message slips, phone calls of 1 minute or less, and one 3-

minute phone call. Shuffle the deck, just toss the cards, and you have grounds for suspicion. You have no more, and not much of that.

You have a cluster of calls at the end of April and early May. How do we explain those? Alcee Hastings had written to Bill Borders and to other members of the Judicial Council, and said:

> Let's have a fundraiser at the annual NBA meeting, and let's get Bill Borders to get Jimmy Carter or Griffin Bell, or both, to come so they can be honored for their appointments of minorities to the Federal bench, and let's raise some money and I want the Judicial Council to get most of it.

And to Bill Borders:

> By the way, we should complete the report we are working on.

You have a series of message slips and 1-minute calls spanning a period from April 27 to May 11. For the most part, those tell you Alcee Hastings did not talk to Bill Borders. You know from a message slip that he was not able to get him. With a minute or less call, you really do not know whether he talked or not.

But on May 11, there were two calls: One at 6:28 and the other at 6:29 in the morning to different numbers. It sounds like he was reaching and not finding him.

Did Justice Hastings have grounds to discuss those questions with Bill Borders? Could Hemphill Pride have been calling at that time, also? Were there other persons in the NBA or otherwise that were matters of concern? Shall we speculate?

Let me, out of respect for the clock, bring your attention to the concern to what I consider the nontrivial events, the events of September and October, again. These are where the perjury charges are lodged. It is, I take it, the House's claim that Alcee Hastings and William Borders met at that airport on the evening of September 11.

The reasoning behind that is a series of telephone messages where the judge kept Borders advised of the flight plan, and the fact there was an overlap in the time; they could have been in the airport; the fact that the judge's plane got in around 8:04, and he did not get to the hotel until 10. They postulate that was so they could review the negotiations Borders was flying down to Miami to embark on.

Let me juxtapose that to the next event. On September 12, William Borders showed back up at the Sheraton Hotel, and that is admitted by the judge. The only claim is the judge said, "I didn't expect him. I was surprised." I take it the House has alleged the judge testified falsely when he said he was surprised.

In other circumstances, he would give him one, but not both. He said, "I can't claim both." I submit you can give him neither. If Alcee Hastings had met with Bill Borders on September 11, Bill Borders would not have bothered to return on September 12. Bill Borders was the master of the pay phone contact. We know that.

Bill Borders was going down to a long-planned large family reunion. The one way, I take it, to guarantee your movements will be noted is to cut out on a large-scale planned family reunion and make as they describe desperate attempts to get back to Washington. That is guaranteed notice.

Alcee Hastings and Jesse McCrary had planned to socialize over the weekend of the 12th in Washington. They had adjoining rooms, a small suite at the Sheraton. On September 12, Mr. McCrary invited Donna Mendez, now Myrill, and Alcee invited Pearl and Margaret Dabreau to join them in their rooms for drinks and snacks, and later for dinner.

I submit to you that a corrupt conspirator who is waiting for a report from the front on how went the opening negotiations does not assemble a party of five, all of whom concede there was a fair amount of liquor being consumed, so that there would be four witnesses to the arrival of his corrupt conspirator. You cannot have them both. It did not happen.

How does the judge explain this evidence, and why should you accept that explanation? There is no dispute that his and Jesse McCrary's plan had been made in advance, and the judge had a speaking engagement, and McCrary had a speaking engagement. They discovered they were going to intersect.

There is no dispute that Borders routinely picked judges up and other dignitaries when they go to the airport. There is no dispute the judge was scheduled to fly in on September 10. There is no dispute that he had a jury trial that did not end that forced him to stay over on the 11th.

There is no dispute that he courteously kept Borders' office informed of his changing flight plans and that he kept Shirley Ross, his date of the evening, informed of the changes in the flight plan. According to the judge, he did not know what time Borders' plane left. He was simply keeping persons posted.

According to the judge, when he got to D.C. National Airport, there was a delay in his flight. I do not find that surprising, especially as one who flies to Florida.

The cab driver could not find Shirley Ross' apartment up near Walter Reed Hospital with ease. Ms. Ross was not ready. They were delayed getting back to the hotel. It took them—whatever time the plane touched down at 8:04, however long it takes to get into the gates, however long it takes to get out of the plane, however long it takes to get back; however long it takes to get the cab driver up to Walter Reed Hospital and find a difficult address; however long it takes your date of the evening to get ready, put on her coat, come back; however long it takes to drive back from the hotel—that is how long it took, and that is why he did not register until that evening. He did not expect Borders on the 12th. If he had been in the deal, he would not have done it.

More importantly, if he had been in the deal, the deal would have ended. There were pictures of Romano in the court file. The judge lived with them at trial. He saw them. Look at the recorded conversation between William A. Borders and Rico and Romano. Find out from this vast wealth of information that Mr. Borders had his information which would lead him to inquire, do some verification. Is this really Frank Romano?

What you read when you read that conversation—and it does not take a Roger Shuy to tell you this—is a brokered deal. William Dredge has told Borders what he can expect Rico and Romano to want and was told he got what they expected William Borders to write. These people are talking in code. They cut a deal faster than anyone I have ever seen. This is the figure you heard. "You got some property, order, 10 days, you mentioned a restaurant, yes, Vincent, kept, no make it a clean vote, down Fontainebleau, Wednesday, the 8th, we are out of there."

On this the deal was cut. There is no inquiry of the kind that a Bill Borders who talked with Alcee Hastings would have made to find out whether Frank Romano is Frank Romano. And had he come back with the description and a report, the deal would have ended.

The jury saw that. The jury saw a Paul Rico when he was younger, 1983, and Judge Alcee Hastings subpoenaed a Frank Romano to his trial. The jury saw three questions in the record: What is your name? Were you the defendant in the case? Would you stand so the jury may see you? I have no further questions.

Among that other evidence that is missing that does not trouble Mr. Bryant is Frank Romano is dead. I cannot bring him in here and ask you to look at him and Paul Rico. I cannot tell you how absurd that comparison would make this case.

Dinner at the Fontainebleau—there is one that is suspicious—a ground for suspicion. Borders sent him there. He was there.

But I submit to you you are being asked on the facts to judge a man which facts you do not know, and when you pose the question on the undisputed facts, we know the judge arrived at 7:45. We know that he had Essie Thompson with him. We know he did not object to the two places removed. We know that before dinner was served, he got up and went in to the Poodle Lounge in the restaurant. We know when he came back, he said he had been looking for friends from D.C. We know these facts.

How would an innocent Judge Hastings, who expected William Borders, have behaved on that day? Would he have committed to an occasional date? "We are going to meet the immediate past president of the National Bar Association, who is coming down to meet with me in Miami tonight."

With the risk of embarrassment that is somewhat unreliable William Borders would not show up or would he have left it to chance, eliminating the possibility of risk, preserving the benefit that his date would be suitably pressed when the immediate past president came. When Mr. Borders did not come, would he have said, "Do not take the places away." Would he have searched every lounge and restaurant, abandoning his date while he went on his mad foray, or would he have chalked it up to a quick visit to an adjoining lounge, saying, "If he comes, fine. If he doesn't come, fine." How would a guilty Alcee Hastings behave? Would he have gone alone? That would have been a show of proof, no date, no excuse. Would he have taken a date as a cover? If he had taken a date as a cover, would he have impressed upon her they were going to meet William Borders in Washington, DC, in terms so certain she could not have forgotten? Would that guilty Alcee Hastings have gone up to the maitre d' and say, "I expected to see William Borders here." Would he have had him paged? Well, that would have blown the show. In that way, he would have had it both ways, made a show of proof, but he would have protected himself on the down side.

I am not going to answer those questions for you, but I submit that, unless you can answer those to the degree of certainty that is required in this case, you must acquit this man. Those are norms, unless you are willing to say that there is only one inference that may be drawn from the behavior of Alcee Hastings on that occasion, and we know Alcee Hastings, and can put ourselves in his shoes so clearly that we can say it, you have to acquit.

Let me now turn to flight and talk to you about the meaning of flight and behavior on October 9 and on the behavior on the eight October nights that have since intervened. It is in our memoranda noted to your attention to the flight evidence is notoriously weak. It is because we do not have statistical studies, how people react, when they are stunned by shocking news. The Supreme Court has recognized, and all the courts recognize, that this is not something you can say that an innocent man behaves this way and a guilty man that way. This is a question where, as the Impeachment Trial Committee noted, we get on sensitive ground. This is a black civil rights leader. William Borders was the president on the National Bar Association. He had been a prominent adviser, high in the Democratic Party in the Carter administration. Judge Hastings had just learned that the FBI had arrested the president of the National Bar Association, a former adviser to President Carter, on charges that had something to do with Alcee Hastings.

I do not know how I would react. I do know that the FBI has at least some grounds to question what his reputation among black civil rights leaders was at that time. Yes, he went home to his mother, yes; whether he got the detail of the day straight or not, he opened himself to cross-examination and he did not need to.

The essential story remains the same. He was concerned about his mother and was told to get back on his own turf. He had good grounds, and that was legitimate. He talked to the FBI as long as they wanted to talk on October 9. He chose his home court. Did he want to think about it? I do not know. If he did not want to think about it, I would have more concern about representing him as a Federal judge. If the FBI called me today and said they want to talk to me, I am going to say what about. I do not want to misinform them. I want to get it straight. That does not strike me as strong evidence of guilt.

Let me tell you about flight evidence that I wish you to consider. Why is this man here? At any point from 1983 onward, he could have quit. Six years, untold millions of dollars, six lawyers, ongoing investigations. Why has he endured? You have in Appendix D a copy of this man's financial statement. It was submitted to the Impeachment Trial Committee, in connection with our request for funds, but it bears on the issue before you. The evidence is uniform. The FBI can see this has never been a man who is ambitious for money. He lived within his means; everybody says that.

This is not a man who does not want some financial security and, indeed, he has testified one of his reasons for going on the bench was to get it. He could have cut off the liabilities, the costs, burdens, the psychological harm, and saved 8 years of his life and reputation by simply quitting, and he could have gone to the streets effectively and done what Mr. Conyers said he has done, attacked institutions with good justification, and emerged comfortable in his own political world, more comfortable financially, in better health, 8 years of his life preserved. Why has he not fled when the escape would have been sure? He stands before you an innocent man. The jury said it in 1983.

The House managers have ably marshaled the circumstantial data to show there are grounds for suspicion. They have ignored the fundamental way in which your duty, your role, is distinct from theirs. They are prosecutors. It is their duty to bring to your attention cases in which they believe the evidence raises concerns about the integrity of the Federal courts.

It is your duty to take into account the independence of the Federal courts. It is your duty as triers to take into account things like the presumption of innocence and due process.

What should be the standard of proof? It is open to every one of you, the 17 who so voted in Claiborne, and the rest of you, in this case of impeachment, to insist upon evidence beyond a reasonable doubt.

I take it as virtually conceded that the threshold standard you must be satisfied, every Senator must be satisfied by, is clear and convincing. As I have submitted in my papers, there is good ground for those who are not willing to insist on evidence beyond a reasonable doubt, to insist on the intermediate standard, clear, convincing, and unequivocal. That is what we insist upon before we will deport someone from these shores. Will you not insist on that before you banish this man?

What weight should you give the jury verdict? If clear and convincing is the threshold in every case of impeachment, and if your decision in March meant that, as I understood it, you were not, in principle, willing to say an acquittal bars a retrial, you must give the fact of that verdict some weight. Frank Romano is dead, Hemphill Pride's telephone records are not here. There has been a penalty for delay. Untold millions, lawyer hours, FBI gathering evidence on one side, nothing, and we are here 8 years after the fact.

How are you going to give that some credit? It does not bar a trial in principle. That was your decision. There is only one fulcrum in this entire case where you can give that weight the respect it is due, and that is in the burden to which you will hold the House's evidence, in the respect you give the presumption of innocence, and in the proof upon which you insist.

This is a case in which great suspicion has been cast. You have volumes of it. I agree with Mr. Bryant, the evidence is massive. The relevant evidence, the evidence it bears, is nothing more than a message slip on April 9, followed by a phone call on April 9, followed by a look at a docket entry, followed by a lot of speculation.

One question, however, remains, and let me address it. How did Bill Borders know what was going on in the *Romano* case, if Alcee Hastings did not tell him? Let me tell you at the outset, I cannot prove that. I can only marshal the circumstantial data to create a suspicion. It is not my burden, but let me do a little marshaling. William Dredge told three different stories, at least, only one of which is consistent with the circumstantial data. In 1985 he told the committee of judges, "I met Bill Borders some time after my indictment and before my arrest." We have no telephone contact between Borders and Dredge prior to May 5.

We have no travel into D.C. National Airport prior to May 5. We have regular evidence in Dredge's telephone records of calls between he and Borders after May 5. We have regular travel into D.C. National Airport after May 5.

I am inclined to think, and I think the evidence shows, he met Bill Borders sometime in early May. By all accounts Dredge, by mid-May was out to make a deal in his drug case. You have the testimony of Kenny Robinson. He came in and tried to fix the case, "$100,000, pay off a judge, pay off a cop, pay off an assistant U.S. attorney; do something to get me out of a drug case; I don't want to go to jail," and for good reason.

You have him going into the U.S. Attorney's Office on July 20, and by his own account in this period he is stringing Borders along and lying to him. He does not claim he is dealing with the Romanos; he claims he is lying to Bill Borders to keep his interest alive in order that Bill Borders will deal.

But how did Dredge find out about the *Romano* case? Dredge knew Joe Nesline.

If you believe Dredge, the Romanos were part of the Genovese family. If you believe Agent Shull, Nesline was connected into the Genovese family in both Florida and Washington. He was a big-time gambler. He was big enough that the FBI sent an undercover agent to go with him tc Amsterdam to try and gather information in 1985.

But if you believe Nesline you believe that this man is innocent because in 1985 he told Agent Shull Borders was running a scam, he had no power on the judge. What was the response?

Permit me to share a bit of my client's outrage. There is a Telex. It is in your materials. The FBI reported that the investigating committee of judges did not want this line of inquiry pursued.

What is my problem with missing evidence? Joe Nesline is incompetent now. We do not know the basis for that; all we know is what he said. How did Borders get the information about the *Romano* case? Dredge could get information anywhere. That is what Jimmy Harmon, his control officer, said. Nesline surely had access. Bill Dredge knew Borders was blowing smoke and had no power on the judge. Kenny Robinson would not agree to fix this case. He had to make a deal. He went out and found out the information he needed about the *Romano* case and put the deal together, or Nesline may have done it originally.

After July 20, how did he find out about how to cut a deal? First, he is the one who told the FBI that the restaurant show of proof is in the cards. After July 20 Agent Murphy asked James Deichert, the *Romano* prosecutor, to keep a report on conversation with Jeff Miller on status of any order.

In August Deichert called Miller, and they both recall it, and learned that Miller was writing an order sufficiently to possibly merit publication. Deichert has testified that *Martino* required that forfeiture order to be revised. *Peacock* reinforced that. Deichert would have known that if Miller was writing an order, although he says he did not believe it, he would have known if Miller was writing an order sufficient to merit publication, it was going to be a reversal.

If he did not know it when he called on August 27, when he read *Peacock* he would have known it. Did Deichert report that to Agent Murphy? Was Bill Dredge briefed?

Bill Dredge is making background conversations throughout this period. In September Deichert calls again. The only one urging Miller to get the order out, although I do not claim it was intentional, is James Deichert, the prosecutor, not Alcee Hastings.

We do have in the record September 16, William Dredge called Caesar's Palace. Alcee Hastings did not know that Bill Borders was out of the fight but William Dredge did, and there is a 4-minute call on his bill to Caesar's Palace.

Did Bill Dredge set up a telephone exchange later in the evening to confirm to Bill Borders, "Yeah, your man was at the hotel; you can come down and pick up your other half. The other guy's got to be having 20. That is why we need the payoff in advance."

Who is the other guy? The other guy is William Dredge. "It has been taken care of. Your man should talk to you." Who is "your man"? Your man is William Dredge.

Can I prove that? No. Can I marshal the circumstantial data to make it very plausible? Yes. The House has done an able job of marshaling circumstantial data. But neither the weight of those green books, nor the volume of the data can do and more than cast suspicion.

Why is this man trusted by those, by judges and senior practitioners, who appear before him now? Why are they willing to accept a jury verdict? Why was he appointed? Why did the FBI acknowledge this is not a man motivated by money? Why do people come forward?

It is the reputation he had earned in the 45 years before these events occurred that established the prior probability.

What is the probability that a man of this kind who cared not about money in any particular degree, who did care about honor, who had a reputation of being honest when it hurt, a reputation that he has demonstrated throughout these proceedings, what is the prior probability that a man of that kind would engage in a little scheme for $150,000?

What is the posterior probability? Why is he here 6 years after the trial? Why has he sacrificed his health, his finance, his reputation? Why has he fought on when escape would have been so simple? That establishes the posterior probability.

Why was not the order issued on September 29? Explain that. Why did he tell Miller before the deal was even on to go back to draft the order? This is Swiss cheese you are dealing with. If you look at the holes you will find a lot of suspicion buried deep inside if you poke your finger.

After this case is over I could, historians may, write a book which gives you three different stories. On each story you will have new grounds for suspicion and new grounds for explanation. That is the nature of scarce circumstantial data. It is fragmented. It is fragmented and stale.

He cannot dispel suspicion. They could not prove guilt.

The only way this man can be convicted is if you get it backward. He owns the presumption of innocence. He earned it. The Constitution assigns it to him. He has the added weight that must be given that jury verdict. He has the added weight that must be given. They cannot speculate about telephone calls from Hemphill Pride, when they did not produce the record. He gets the inference. It is on his side of the scale. They must come forward and satisfy you with a degree of certainty that is commensurate with this occasion.

For the 10th time you are called upon to pass judgment on a U.S. district judge. This was a judge who in his own community is viewed as outstanding but who is a maverick. He is not exactly everyone's judge but that was a responsibility of the President and the Senate that made that political choice.

The duty now is to protect this judge and the right of every President and Senate and the right of every judge who is appointed to execute his duties comfortably, that he need not fear, be it venal or dumb, he need not fear that the FBI will casually arrest someone at the scene of a payoff and leave a circumstantial residue of suspicion and get away with it, that they will ultimately be protected in this body to which the Constitution assigned responsibility because it thought it was the only body who could fairly adjudicate and stand between the right of the individual accused and the representative of the people, his accuser.

You have been called on nine times before. You have acquitted four. I submit to you all you can do on this occasion if you study the evidence is acquit again.

Thank you, Mr. President.

The PRESIDENT pro tempore. Thank you, Professor Anderson. The House will now be heard in rebuttal.

Mr. Bryant, you have 32 minutes and 16 seconds remaining. Before you proceed with your prepared rebuttal, the Chair has a question submitted to the Chair.

Mr. MITCHELL. Mr. President, I am advised that a vote is now occurring in the House and that there are approximately 9 minutes remaining to accommodate the managers. Would they prefer to go over and vote and come back? Or could we keep the procedure.

Manager BRYANT. I suggest it would be agreeable to continue the proceedings here and take chances with the vote.

Mr. MITCHELL. I am advised by Mr. Bryant that the House managers are agreeable to permitting the procedures to continue and they will rotate going to the vote as before.

The PRESIDENT pro tempore. Very well.

If Representative Gekas could remain at this moment, the Chair will address to him the question which was submitted to the Chair by the majority leader, Senator Mitchell. The question to Representative Gekas is as follows:

> In your presentation you made no mention of why you believed Judge Hastings made the unauthorized wiretap disclosure. What do you suggest was his motive for making the unauthorized disclosure?

Manager GEKAS. I thank the President for posing the question. That has been a subject of discussion from the very start and although there is no concrete chain of events or chain of evidence that would show exactly what the motive is, the only one that can be finally propounded is that this judge wanted to demonstrate to Steve Clark that he had control of the situation, that he would do a favor or that somehow he was able to conduct a wiretap or other Federal process and be in control of it and let Steve Clark know that he was a powerful man.

The President pro tempore. Another question which has been submitted to the Chair and which may be answered by Mr. Bryant or anyone among the Representatives from the House. This has been submitted by Senator Joseph Lieberman. It is as follows:

> Assuming for the sake of argument that the Senate votes to acquit Judge Hastings on Articles I to XVI, must the Senate also necessarily vote to acquit him on Article XVII? If no, what standard of proof do you urge us to apply in judging Article XVII, the "omnibus" article, and why should it be different or yield a different result than for Articles I to XVI?

Manager Bryant. Mr. President, the House submits to the Senate that the standard of proof that you should follow is the standard of preponderance of the evidence. But if you wish to apply a higher standard, the standard of proof of clear and convincing is the appropriate standard. It is a higher standard than preponderance, but it is less than a reasonable doubt. You can have a reasonable doubt but still conclude that the evidence is clear and convincing. A clear and convincing standard would require a vote of conviction if a Senator found it highly probable that Judge Hastings had committed an impeachable offense.

With regard to the question of whether or not acquittal on the previously mentioned articles would therefore mandate an acquittal on article XVII, we assert to the Senate that it would not mandate that acquittal and that we understand that in the past the Senate has chosen to take up an omnibus article and pass it when, in fact, it has previously not adopted lesser but included articles that were also included.

In addition to that, we would submit to the Senate that there is no restraint on the part of this Senate to convict; that is to say, you are free, under the Constitution, and unrestrained under the law to convict on the basis of any article regardless of the perception or the reality that there might be some contradiction between a decision regarding one article and a decision regarding any other.

The President pro tempore. The Chair has one final question to address to the House managers. This question is submitted by Senator Bingaman.

> In their Post-Trial Memorandum, the House Managers state that if the Senate were to vote to acquit Judge Hastings on Article I, which charges him with having conspired with William Borders to solicit a bribe from the Romano brothers, that decision would be dispositive of certain of the false statement articles, namely, Articles II, III, IV, V, VII, VIII, and IX. According to the House Managers, it would be inconsistent to acquit Judge Hastings of involvement in the bribery conspiracy and to convict him on these particular false statement articles. If the Senate were to vote to acquit on Article I, would either party object to the entry of a judgment of acquittal on Articles II, III, IV, V, VII, VIII, and IX, without the taking of a vote by the Members on those articles?

Manager Bryant. Mr. President, we would not object.

Mr. Anderson. The respondent would not object, Mr. President.

The President pro tempore. Very well.

Now, if the House managers would like to proceed with their rebuttal.

Mr. Mitchell. Mr. President, may I inquire as to how much time remains for the House managers?

The **President** pro tempore. Thirty-two minutes and 16 seconds remain to the House for rebuttal; Judge Hastings and his party have 20 minutes and 14 seconds remaining.

The House, under the rules closes the argument.

Mr. Manager **Bryant**. Mr. President, does that mean that I should defer until the rest of the time is used up by the respondent?

The **President** pro tempore. Does Judge Hastings wish to respond now?

Mr. **Anderson**. I think we have said what we want to say. If there are questions, we would be happy to take them, but we waive the rest of our time.

The **President** pro tempore. Very well. The time is waived, except for possible questions.

Mr. Manager **Bryant**. Mr. President, I will be mercifully short. I wish only to make a few points.

I believe that it is important for the Senate to focus carefully on the conservation of October 5 one last time because this conversation is a quicksand from which Judge Hastings cannot extricate himself, and the more he struggles and the more he produces alternative explanations, the more thoroughly he finds himself entangled in a situation from which there is no escape.

A few moments ago you heard Mr. Anderson tell you that the October 5 conversation—that is the coded conversation, a copy of which all of you have—was the conversation of two men who had not talked in a very long time. But I ask you to pick the conversation up and look at it. It is only one page in length. I ask you to look at the way the conversation begins and the way the conversation ends and to ask yourselves: Is it likely, is it even possible, that this is a conversation between two friends who have not recently talked?

Note how abruptly it begins: "Yes, my brother."

"Hey, my man."

"Um hum."

"I've drafted all those ah, ah, letters, ah, for Hemp * * *."

It goes right to the business. No, "How are you doing? How is business? How are things? What have you heard?" No introductory message whatsoever.

And how does it end? "OK."

"Right."

"Bye bye."

No, "Say hi to the wife."

No, "Say hello to your mom."

No query with regard to what you are going to do next week. Nothing. This is a business conversation that was conducted for the purpose of communicating information in such a way that outsiders would not be able to understand what it meant.

The fact of the matter is Hemp never wrote anything down for William Borders. He testified to that; perhaps the most powerful witness in the whole case. He never wrote anything down for Borders, as Borders said he did in his conversation.

Now, if this is really a conversation about Hemp between Borders and Hastings in an effort to help their friend Hemphill Pride, why would Borders be lying to Judge Hastings? The fact of the matter is he was not talking about Hemp. He was communicating the information about the bribery scheme.

And Hemp testified clearly and concisely he never heard about any letters. He did not want any letters. He refused, as well, to go along with the judge's attempt to get him to go along with the judge's explanation of his conversation and of those letters.

And finally what I think wraps it up is, after all these months of talking, all this business about letters for Hemp, all the efforts by this respondent to explain his contacts by saying that somehow he and Borders were trying to help Hemp, they never sent any of the letters for Hemp. In fact, not one single thing was ever done.

I think it would be helpful if you took a look at the letters that eventually showed up, interestingly enough, right at the last minute, before Judge Hastings' trial began. These letters are part of the record of this case. They are in a box. They usually reside in a filing cabinet over here. I hope you will take the time to look at many of the exhibits.

The fact of the matter is he claims in his October 5 conversation that it was about letters for Hemp. He learned about that during the trial of the other case. He learned that the Government had a tape recording of the October 5 conversation. So he had to do something to be able to explain away the meaning of the October 5 conversation and he decided to produce the letters. And I have them in my hand here. He claims they were written during a trial while he was sitting on the bench and paying attention to the trial with one ear and paying attention to the business of writing these letters with another ear. Examine them.

I will give credit to the members of the Senate trial committee who brought this out, because we did not point it out first. These letters are written without a single mistake, a single scratchout, a single starting over. They are perfectly written.

These are not the letters—I hope you will examine them—that were written by somebody who was drafting letters for him. These letters that were put together by somebody who was trying to find a way to explain away a tape recorded conversation which he learned by watching his friend's trial that had to be explained if he was to find a way to be acquitted. They were never typed. They were never sent. In fact, they were never even shown to his original counsel, the lawyer he hired originally to defend him, who, by the way, withdrew from the case.

He never saw these letters. They surfaced nearly a year later.

Members of the Senate, these letters are fakes. I urge you to examine them and arrive at your own conclusion.

They not only convict this respondent of the bribery scheme, they also convict him of article IX, in which we have alleged that he purposely lied about the nature of these letters.

I have mentioned in my remarks, Mr. Anderson mentioned in his response, all of the contacts. The astonishing fact that every single event in the *Romano* case is accompanied by a contact between Judge Hastings and William Borders. And he attempts to explain away the incriminating contacts by giving after-the-fact explanations, each of which are wholly unpersuasive and at times perfectly preposterous.

For example, he testified before the Impeachment Trial Committee that every time he spoke to William Borders in 1981, every time, they discussed Hemphill Pride. That was his testimony. They discussed the need to help Hemphill Pride. Yet not one time, as I said a moment ago, between February and October 1981 when all the relevant telephone calls occurred, did Judge Hastings or Borders take any concerted action to help their friend, Mr. Pride.

According to the judge, in many of the calls, Borders was pestering him, pushing him to write letters in Pride's support. That was the judge's testimony. But it was not until October 5, 8 months after the calls had begun, that the letters, he says, were written. And even then the judge fails to send them out and fails to inform Mr. Borders that he did not send them out.

We submit to you that Judge Hastings's own actions belie this feeble explanation that Hemphill Pride was the reason he and Borders were repeatedly in contact.

Knowing that this explanation does not wash, and makes no sense, the judge goes on to provide other reasons, now, why he and Borders were so closely allied.

You heard Mr. Anderson mention a few of them a moment ago. He emphasizes that both he and Borders were members of the National Bar Association and that, therefore, had been speaking about upcoming events. But the problem is that is explained by one of Judge Hastings' own witnesses. He called as a witness Judge Henry Latimer.

The section of the National Bar Association to which Judge Hastings belongs, the Judicial Council, is an autonomous section of the organization, responsible for its own programs and its own social functions.

As president of the general National Bar Association, William Borders would not have regular interaction with the judges who are active in their autonomous section of the NBA. So his explanation that they had to be in contact because of common membership in this organization simply does not hold water.

Moreover, even if Judge Hastings and Borders were in contact about these National Bar Association events, those events fall far short of explaining away the astonishing number of contacts.

The judge offers only three NBA events, in fact, in February, May, and July 1981, which fail to explain all the other significant telephone calls throughout the rest of the year, especially those in September and October.

We just submit to you, Members of the Senate, that unlike a jury in a normal case, you will have the opportunity to examine before you vote the documents in this case, to hear the arguments of the members of the committee.

I strongly urge you to take it up, take up the task of examining those documents and these exhibits and the testimony of the witnesses carefully. We do not believe that an examination of those can yield anything other than a decision that this judge is guilty of the articles as charged.

I will just close with these questions:

The judge says he felt like an innocent man. His lawyer says we have put together a list of circumstantial events that somehow, by some astonishing coincidence, point to his guilt and he should not be looked upon as guilty. But if he felt innocent, why did he flee the city on the day his best friend was arrested? Why did he flee the city when the FBI asked to talk to him? Why would he not want to help them clear up any question regarding the possibility of bribery in his own courtroom? Why did he call Borders' home, 3 days after Borders had been arrested, as he tells it, for trying to destroy the judge's reputation by tricking him and making it appear that he was, somehow, part of a bribery scheme? Why was he calling his house?

Why did he show up at the prescribed time at the Fontainebleau Hotel, right on the money? If he believed he was going to meet Borders there, why did not he make a reservation for Borders? Why did he sit idly while they moved away the other two place settings? Why did not he tell his date that they were going to meet someone at dinner that night? And how can you explain that every single event in the *Romano* case is accompanied by contacts by telephone or in person between Judge Hastings and William Borders?

Finally, why did he have the coded conversation? Surely, no one in the face of the overwhelming evidence to the contrary can believe that coded conversation had anything to do with Hemphill Pride. Hemphill Pride knows it did not have anything to do with Hemphill Pride. He testified against his former best friend that it did not have anything to do with him. He did not need letters. He did not want letters. Letters would hurt him.

Finally, I would repeat my appeal to you to look at record. A moment ago I heard Mr. Anderson stand up and say, "the Investigating Committee of the judicial district based its decisions on newspaper articles."

Members of the Senate, the investigating committee of the judicial district based its decision on 100 witnesses, 3,000 exhibits, 3 years of an investigation and a 500-page report directed by John Doar, the former head of the Civil Rights Division of the Justice Department, a man with impeccable civil rights credentials. We investigated this matter for a year and a half. The matter received a 1-month trial before the Senate.

I suggest to you that the astonishing amount of evidence that points to the guilt of Judge Alcee Hastings cannot be overlooked; that your responsibility, as difficult as it is, and our responsibility, as difficult as it is, must be, as charged, to make the decision to impeach this judge, to remove him from office, and forever remove the stain that has been left upon the judicial system of the United States by a scheme which cannot be sanctioned by verdict of not guilty.

Mr. President, we thank you very much for the time and the great patience that you have given to this case. With that we close.

The President pro tempore. Thank you, Representative Bryant.

The Chair thanks both the Representatives on the part of the House and the respondent on his part.

"One of the key questions," asks Senator Levin, of the House managers, "with regard to the bribery allegations, is the authenticity of the 'letters to Hemp,' produced by Judge Hastings. Judge Hastings testified that he offered to show these letters to John Shorter, William Border's attorney, before the Borders' trial in March 1982.

"Shorter would appear to be a key witness as to the authenticity of these vital letters

"Why," asks Senator Levin, "didn't you call him as a witness during the Senate committee proceedings"?

Mr. Manager Bryant. Shorter's previous testimony was that he never looked at the documents, and we felt that there was no purpose to be served in calling him because any testimony beyond that would have been a violation of his attorney-client relationship with Mr. Borders and, therefore, he could not have testified in any meaningful way about the involvement of Mr. Borders and Judge Hastings in this matter.

The President pro tempore. The majority leader is recognized.

Mr. Mitchell. Mr. President, pursuant to impeachment rule XX, I move that upon the establishment of a quorum tomorrow, pursuant to the live quorum call starting at 1:45 p.m., the doors of the Senate be closed then while the Senate is deliberating its decisions on this matter.

The President pro tempore. Without objection, the motion is agreed to.

Pursuant to the previous order, this completes the Senate's consideration today of the articles of impeachment. The Senate will begin its closed door considerations on the articles of impeachment tomorrow at 2 p.m., following the live quorum call that shall begin at 1:45 p.m.

SENATE ORDERS RE: CLOSED DELIBERATION

[From the Congressional Record—Senate, October 19, 1989]

CALL OF THE ROLL

The President pro tempore. The Chair in his capacity as a Senator from the State of West Virginia suggests the absence of a quorum. The clerk will call the roll.

The legislative clerk proceeded to call the roll and the following Senators entered the Chamber and answered to their names:

[Quorum No. 7]

Byrd
DeConcini
Jeffords
Metzenbaum
Pressler
Reid
Specter

The President pro tempore. A quorum is not present. The clerk will call the names of the absentees.

The legislative clerk resumed the call of the roll, and the following Senators entered the Chamber and answered to their names:

Burns
Cochran
Cranston
Graham
Grassley
Heflin
Nickles
Wallop
Wirth

The President pro tempore. A quorum is not present.

The legislative clerk resumed the call of the roll and the following Senators entered the Chamber and answered to their names:

Adams
Armstrong
Baucus
Bentsen
Biden
Bingaman
Bond
Boren
Boschwitz
Bradley
Breaux
Bryan
Bumpers
Burdick
Burns
Byrd
Chafee
Coats
Cochran
Cohen
Conrad
Cranston
Danforth
Daschle
DeConcini
Dixon
Dodd
Dole
Domenici
Durenberger
Exon
Ford
Fowler
Garn
Glenn
Gore
Gorton
Graham
Gramm
Grassley
Harkin
Hatch
Hatfield
Heflin
Heinz
Helms
Hollings
Inouye
Jeffords
Johnston
Kassebaum
Kasten
Kennedy
Kerrey
Kerry
Kohl
Lautenberg
Leahy
Levin
Lieberman
Lott
Lugar
Matsunaga
McCain
McClure
McConnell
Metzenbaum
Mikulski
Mitchell
Moynihan
Murkowski
Nickles
Nunn
Packwood
Pell
Pressler
Pryor
Reid
Riegle
Robb
Rockefeller
Roth
Rudman
Sanford

Sarbanes
Sasser
Shelby
Simon
Simpson
Specter
Stevens
Symms
Thurmond
Wallop
Warner
Wirth

The President pro tempore. A quorum is present. May we have order in the Senate. The public address system is not on and it is a little difficult for the Chair to be heard. The Chair would appreciate the cooperation of all members. The Senate will be in order.

The majority leader is recognized.

PRIVILEGE OF THE FLOOR

Mr. Mitchell. Mr. President, I ask unanimous consent that floor privileges during today's closed impeachment proceedings for Judge Alcee L. Hastings be granted to the individuals listed on the document I now send to the desk.

The President pro tempore. Without objection, it is so ordered.

The document follows:

Michael Davidson, Senate Legal Counsel.
Morgan Frankel, Assistant Senate Legal Counsel.
Martha Pope, Chief of Staff, Majority Leader.
Charles Kinney, Democratic Policy Committee.
George Carenbauer, Democratic Policy Committee.
Anita Jensen, Senator Mitchell.
Rebecca Roberts, Office of President pro tempore.
Roy Greenway, Senator Cranston.
Robert A. Bean, Assistant Secretary for Majority.
Sheila Burke, Chief of Staff, Republican Leader.
Robert Dove, Republican Leader's Staff.
Dennis Shea, Republican Leader's Staff.
Jim Whittinghill, Republican Leader's Staff.
Richard Quinn, Republican Leader's Staff.
Mike Tongour, Assistant Republican Leader's Staff.
John Doney, Assistant Secretary for the Minority.
Elizabeth Greene.
Lorraine Waller, Judiciary Committee Majority.
Thad Strom, Judiciary Committee Minority.
Terry Wooten, Judiciary Committee Minority.
Ron Welch, Judiciary Committee Minority.
Jack Sousa, Rules Committee Majority.
Kevin Kayes, Assistant Parliamentarian.
Jim Weber, 2nd Assistant Parliamentarian.
Jennifer Smith, 3rd Parliamentarian.
David Tinsley, Assistant Journal Clerk.
Scott Bates, Assistant Legislative Clerk.
Scott Sanborn, Assistant Chief Reporter.
Frank A. Smonskey, Official Reporter.
Ronald Kavulick, Official Reporter.
Jerald D. Linnell, Official Reporter.
Raleigh Milton, Official Reporter.
Joel Breitner, Official Reporter.
Mary Jane McCarthy, Official Reporter.
Paul A. Nelson, Official Reporter.
Mark Lacovara, Staff Assistant, Official Reporter.
Kathy Drummond, Staff Assistant, Official Reporter.
Elaine W. Stone, Counsel.
Mark A. Klugheit, Counsel.
Bruce O. McBarnette, Counsel.
Anthony L. Harvey, Administrative Assistant.
P. Casey McGannon, Administrative Assistant.
Isbael T. McVeigh, Administrative Assistant.
Patrick Von Bargen, Senator Bingaman.
Mark Gerchick, Senator Leahy.
Edward Garvey, Senator Durenberger.

John Monahan, Senator Pryor.
James D.P. Farrell, Senator Rudman.
Timothy Hay, Senator Bryan.
Chris Leritz, Senator Bond.
William Hoppner, Senator Kerrey.
Anthony Lowe, Senator Gorton.
John Nakahata, Senator Lieberman.
Lori Bass, Senator Burns.
Ron Weich, Senator Specter.

The PRESIDING OFFICER. Under the order, the Senate will now go into closed session and the Chair, pursuant to rule XXI, now directs the Sergeant at Arms to clear all galleries, close all doors of the Senate Chamber, and exclude from the Chamber and its immediate corridors all employees and officials of the Senate who, under the rule, are not eligible to attend a closed session and who are not sworn to secrecy.

(At 2:05 p.m., the doors of the Chamber were closed. The proceedings of the Senate were held in closed session until 9:20 p.m.)

SENATE VOTES ON THE ARTICLES OF IMPEACHMENT AGAINST JUDGE ALCEE L. HASTINGS

[From the Congressional Record—Senate, October 20, 1989]

The PRESIDENT pro tempore. Under the previous order, a quorum having been established, the Senate will resume its consideration of the articles of impeachment against Judge Alcee L. Hastings. The Sergeant at Arms will make the proclamation.

The Sergeant at Arms, Henry K. Giugni, made proclamation as follows:

Hear ye! Hear ye! Hear ye! All persons are commanded to keep silence, on pain of imprisonment, while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives against Alcee L. Hastings, U.S. district judge for the southern district of Florida.

The PRESIDENT pro tempore. The majority leader is recognized.

Mr. MITCHELL. Mr. President, the Senate deliberated yesterday for 7 hours on the articles of impeachment against Judge Alcee L. Hastings. We meet this morning to vote on the articles.

Before proceeding to the voting, I ask unanimous consent that Senators may be permitted, within 7 days from today, to have printed in the Record opinions or statements explaining their votes.

The PRESIDENT pro tempore. Hearing no objection, it is so ordered.

The majority leader is recognized.

Mr. MITCHELL. In response to a question from Senator Bingaman to the parties in the final argument on yesterday, Representative Bryant from the House and Mr. Anderson for Judge Hastings stated that neither would object to the recording of an acquittal on articles II through V, and VII through IX without the taking of a vote by the Members of the Senate on those articles, if the Senate votes to acquit Judge Hastings on article I.

Senator Bingaman's question and the parties' response was based upon the position taken by the House in its post-trial memorandum that it would be inconsistent to acquit Judge Hastings on article I and to convict him on these particular false statement articles.

To implement this agreement between the House and Judge Hastings, I ask unanimous consent that the majority leader be recognized if the Senate votes to acquit Judge Hastings on article I, for the purpose of propounding a unanimous-consent agreement on the recording of an acquittal on articles II through V, and VII through IX.

The PRESIDENT pro tempore. Without objection——

Mr. HEFLIN. I will reserve the right to object. I have some question in my mind as to whether or not article IX would fall into that category. Article IX may be different, and I feel that there ought to be a vote on article IX in that regard.

Mr. **Mitchell**. Do I take the Senator's statement as objection to the unanimous-consent request?

Mr. **Heflin**. Well, yes, as in regards to article IX. The others, I think, fall into that category, but I do have some question on article IX.

If the leader wants to change it to a unanimous consent in that regard?

Mr. **Mitchell**. Mr. President, I then inquire of counsel for the two parties whether they object to my restating the unanimous-consent request, but modifying it in the manner suggested by Senator Heflin.

Mr. Bryant?

Mr. Manager **Bryant**. There will be no objection on the part of the House to that.

Mr. **Mitchell**. Mr. Anderson?

Mr. **Anderson**. No objection.

Mr. **Mitchell**. Accordingly, Mr. President, I ask unanimous consent that the majority leader be recognized if the Senate votes to acquit Judge Hastings on article I for the purpose of propounding a unanimous-consent agreement on the recording of an acquittal on articles II through V and VII and VIII.

The **President** pro tempore. Is there objection? The Chair hears no objection. It is so ordered.

Mr. **Mitchell**. Mr. President, on March 16, 1989, a unanimous-consent agreement was entered to provide that the voting records of any Senators excused from voting on all questions during the impeachment trial of Judge Alcee Hastings not be calculated to include any rollcall votes during the trial. The four Senators who have been excused from voting are the Senator from Indiana [Mr. Coats]; the Senator from Vermont [Mr. Jeffords]; the Senator from Mississippi [Mr. Lott]; and the Senator from Florida [Mr. Mack].

Mr. **Dole**. Mr. President, I want to establish, together with the majority leader, this is a unanimous-consent agreement on voting records; it is not a precedent for calculating voting records on any other occasion.

Mr. **Mitchell**. Mr. President, the Republican leader is correct. As was stated on March 16, this agreement was entered for the protection of the Senate, not for the protection of individual Senators. Because these four Members were Members of the House of Representatives when the House deliberated on the Hastings impeachment, some might suggest that an appearance of prejudgment exists. Their excuse from participation is intended to protect against such an appearance.

Because the unanimous-consent agreement serves for this singular purpose and this purpose alone, there is no basis for using this agreement in the future for the protection of the voting records of individual Senators.

Mr. President, I would like to now repeat what I stated last evening and again this morning and request that all Senators remain in their seats during voting on whatever number of votes occur, for three purposes.

The first is to facilitate the handling of this matter in the most fair and appropriate manner for all concerned. That is and should be our overriding objective.

The second is to maintain the decorum of the Senate while these grave proceedings are underway.

And the third is to accommodate the interests of Senators themselves.

We will have possibly as many as 17 votes, possibly less, depending upon the outcome of the first vote. I ask that Senators remain in their seats during all of the votes to permit the calling of the roll just once on each vote so that it can be done in an orderly, proper manner and the shortest time possible will be required to elapse. That will not be possible if Senators, as they do from time to time, get up and walk around the well and go out to the cloakrooms and engage in other conversation during these proceedings. These are serious proceedings. They affect not only Judge Hastings, but they also affect the Senate and our system of Government. So far, the Senate has treated this matter with the significance which it deserves, and I urge upon my colleagues, having come this far in that fashion, let us complete the process in a proper manner.

The Chair will shortly instruct the Members of the Senate on the question to be put and the manner of response. I thank all Senators for their attention and courtesy until now and for what I know will be their continued attention and courtesy for Judge Hastings, to the House managers and to this entire matter.

Mr. BIDEN. Parliamentary inquiry.

The PRESIDENT pro tempore. The Senator will state his parliamentary inquiry.

Mr. BIDEN. Mr. President, the Constitution requires that two-thirds of the Senators be present for impeachment.

The PRESIDENT pro tempore. That is correct.

Mr. BIDEN. In light of the fact four Senators may be present but not voting, does that affect in anyway the requisite number of votes required for impeachment?

The PRESIDENT pro tempore. Four Senators have been excused and they will, therefore, not be counted.

Mr. BIDEN. I thank the Chair.

The PRESIDENT pro tempore. The clerk will read the first article.

Mr. NICKLES. Mr. President, parliamentary inquiry.

The PRESIDENT pro tempore. The Senator will state his inquiry.

Mr. NICKLES. In response to the question of the Senator from Delaware, if we have four Senators who are not voting, so they will not be counted, what is the number, if two-thirds is required? Is that number 67? Is that number 65?

The PRESIDENT pro tempore. Two-thirds of those present and voting.

Mr. NICKLES. So the number would be 67?

The PRESIDENT pro tempore. No. That would be a constitutional majority. That would be two-thirds of the Senators duly chosen and sworn.

Mr. NICKLES. Two-thirds of the Senators voting?

The PRESIDENT pro tempore. Two-thirds of the Senators who are present and voting.

ARTICLE I

The **President** pro tempore. The clerk will read the first article of impeachment.

The assistant legislative clerk read as follows:

ARTICLE I

> From some time in the first of 1981 and continuing through October 9, 1981, Judge Hastings and William Borders, then a Washington, D.C. attorney, engaged in a corrupt conspiracy to obtain $150,000 from defendants in *United States v. Romano,* a case tried before Judge Hastings, in return for the imposition of sentences which would not require incarceration of the defendants.
>
> Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

The **President** pro tempore. The Chair will read, for the benefit of everyone present in the Chamber and in the galleries, paragraph 6 of rule XIX of the standing rules of the Senate which states as follows:

> Whenever confusion arises in the Chamber or the galleries, or demonstrations of approval or disapproval are indulged in by the occupants of the galleries, it shall be the duty of the Chair to enforce order on his own initiative and without any point of order being made by a Senator.

The Chair would deeply appreciate the cooperation of everyone in the Chamber and in the gallery in maintenance of order.

VOTE ON ARTICLE I

The **President** pro tempore. The Chair reminds the Senate that each Senator, when his or her name is called, will stand in his or her place and vote guilty or not guilty. The question is on the first article.

Senators, how say you? Is the respondent, Alcee L. Hastings, guilty or not guilty? The rollcall is automatic. The clerk will call the roll.

The legislative clerk called the roll.

Mr. **Simpson**. I announced that the Senator from California [Mr. Wilson] is necessarily absent.

The **President** pro tempore. Are there any other Senators wishing to vote?

The result was announced—guilty 69, not guilty 26, as follows:

[Rollcall Vote No. 254]

(Subject: Article I—Court of Impeachment—Judge Alcee L. Hastings)

GUILTY—69

Baucus
Bentsen
Bond
Boren
Boschwitz
Breaux
Bryan
Bumpers
Burns
Byrd
Chafee
Cochran
Cohen
Conrad
Danforth
Daschle
DeConcini
Dixon
Dole
Domenici
Durenberger
Exon
Ford
Fowler
Garn
Glenn
Gore
Gorton
Gramm
Grassley
Hatfield
Heinz
Helms
Hollings
Humphrey
Inouye
Johnston
Kassebaum
Kasten
Kennedy
Kerrey
Kerry
Kohl
Lautenberg
Lugar

Matsunaga
McCain
McClure
McConnell
Mitchell
Murkowski
Nickles
Nunn
Pell
Pressler
Reid
Riegle
Robb
Rockefeller
Roth
Rudman
Sarbanes
Simon
Simpson
Stevens
Symms
Thurmond
Wallop
Warner

NOT GUILTY—26

Adams
Armstrong
Biden
Bingaman
Bradley
Burdick
Cranston
D'Amato
Dodd
Graham
Harkin
Hatch
Heflin
Leahy
Levin
Lieberman
Metzenbaum
Mikulski
Moynihan
Packwood
Pryor
Sanford
Sasser
Shelby
Specter
Wirth

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—5

Coats
Jeffords
Lott
Mack
Wilson

The PRESIDENT pro tempore. On this article of impeachment, 69 Senators have voted guilty, 26 Senators have voted not guilty. Two-thirds of the Senators present and voting having voted guilty, the verdict on article I is guilty.

ARTICLE II

The PRESIDENT pro tempore. The Chair now asks the clerk to read the second article.

The legislative clerk read as follows:

ARTICLE II

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that Judge Hastings and William Borders, of Washington, D.C., never made any agreement to solicit a bribe from defendants in *United States v. Romano*, a case tried before Judge Hastings.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

VOTE ON ARTICLE II

The PRESIDENT pro tempore. The question is on the second article of impeachment.

Senators, how say you, is the respondent, Alcee L. Hastings, guilty or not guilty?

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. SIMPSON. I announce that the Senator from California [Mr. Wilson] is necessarily absent.

The result was announced—guilty 68, not guilty 27, as follows:

[Rollcall Vote No. 255]

(Subject: Article II—Court of Impeachment—Judge Alcee L. Hastings)

GUILTY—68

Baucus
Bentsen
Bond
Boren
Boschwitz
Breaux
Bryan
Bumpers
Burns
Byrd
Chafee
Cochran
Cohen
Conrad
Danforth
Daschle
DeConcini
Dixon
Dole
Domenici
Durenberger
Exon
Ford
Fowler
Garn
Glenn
Gore
Gorton
Gramm
Grassley
Hatfield
Heinz
Helms
Hollings
Humphrey
Inouye
Johnston
Kassebaum
Kasten
Kennedy
Kerrey
Kerry
Kohl
Lautenberg
Lugar
Matsunaga
McCain
McClure
McConnell
Mitchell
Murkowski
Nickles
Nunn
Pell
Pressler
Reid
Riegle
Robb
Rockefeller
Roth
Rudman
Sarbanes
Simon
Simpson
Symms
Thurmond
Wallop
Warner

NOT GUILTY—27

Adams
Armstrong
Biden
Bingaman
Bradley
Burdick
Cranston
D'Amato
Dodd
Graham
Harkin
Hatch
Heflin
Leahy
Levin
Lieberman
Metzenbaum
Mikulski
Moynihan
Packwood
Pryor
Sanford
Sasser
Shelby
Specter
Stevens
Wirth

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—5

Coats
Jeffords
Lott
Mack
Wilson

The President pro tempore. On this vote, there are 68 yeas, and 27 nays.

Two-thirds of the Senators present and voting, having voted guilty, the verdict on the second article is guilty.

Mr. Mitchell addressed the Chair.

The President pro tempore. The majority leader.

UNANIMOUS-CONSENT AGREEMENT

Mr. Mitchell. Mr. President, I ask unanimous consent that Judge Hastings and his counsel be permitted to be excused for the remainder of the votes, if they so desire.

The President pro tempore. Without objection, it is so ordered.

Mr. Hastings. Thank you, Mr. President.

The President pro tempore. The Chair thanks Judge Hastings and his party.

ARTICLE III

The President pro tempore. The clerk will state the third article. The assistant legislative clerk read as follows:

ARTICLE III

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that Judge Hastings never agreed with William Borders, of Washington, D.C., to modify the sentences of defendants in *United States* v. *Romano*, a case tried before Judge Hastings, from a term in the Federal penitentiary to probation in return for a bribe from those defendants.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

VOTE ON ARTICLE III

The PRESIDENT pro tempore. The question is on the third article of impeachment. The rollcall is automatic. Senators, how say you? Is the respondent, Alcee L. Hastings, guilty or not guilty? The clerk will call the roll.

The legislative clerk called the roll.

Mr. SIMPSON. I announce that the Senator from California [Mr. Wilson] is necessarily absent.

The PRESIDENT pro tempore. Are there any other Senators in the Chamber who desire to vote?

The result was announced—guilty 69, not guilty 26, as follows:

[Rollcall Vote No. 256]

(Subject: Article III—Court of Impeachment—Judge Alcee L. Hastings)

GUILTY—69

Baucus
Bentsen
Bond
Boren
Boschwitz
Breaux
Bryan
Bumpers
Burns
Byrd
Chafee
Cochran
Cohen
Conrad
Danforth
Daschle
DeConcini
Dixon
Dole
Domenici
Durenberger
Exon
Ford
Fowler
Garn
Glenn
Gore
Gorton
Gramm
Grassley
Hatfield
Heinz
Helms
Hollings
Humphrey
Inouye
Johnston
Kassebaum
Kasten
Kennedy
Kerrey
Kerry
Kohl
Lautenberg
Lugar
Matsunaga
McCain
McClure
McConnell
Mitchell
Murkowski
Nickles
Nunn
Pell
Pressler
Reid
Riegle
Robb
Rockefeller
Roth
Rudman
Sarbanes
Simon
Simpson
Stevens
Symms
Thurmond
Wallop
Warner

NOT GUILTY—26

Adams
Armstrong
Biden
Bingaman
Bradley
Burdick
Cranston
D'Amato
Dodd
Graham
Harkin
Hatch
Heflin
Leahy
Levin
Lieberman
Metzenbaum
Mikulski
Moynihan
Packwood
Pryor
Sanford
Sasser
Shelby
Specter
Wirth

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—5

Coats
Jeffords
Lott
Mack
Wilson

The **President** pro tempore. Upon this article of impeachment, 69 Senators have voted guilty; 26 Senators have voted not guilty.

Two-thirds of the Members present having voted guilty, the Senate adjudges that the respondent, Alcee L. Hastings, is guilty as charged in this article.

ARTICLE IV

The **President** pro tempore. The clerk will now read the fourth article of impeachment.

The legislative clerk read as follows:

ARTICLE IV

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that Judge Hastings never agreed with William Borders, of Washington, D.C., in connection with a payment on a bribe, to enter an order returning a substantial amount of property to the defendants in *United States v. Romano*, a case tried before Judge Hastings. Judge Hastings had previously ordered that property forfeited.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

The **President** pro tempore. The question on article IV is: Is the respondent, Alcee L. Hastings, guilty or not guilty?

The clerk will call the roll.

The legislative clerk called the roll.

Mr. **Simpson**. I announce that the Senator from California [Mr. Wilson] is necessarily absent.

The **President** pro tempore. Are there any other Senators in the Chamber who desire to vote?

The result was announced—guilty 67, not guilty 28, as follows:

[Rollcall Vote No. 257]

(Subject: Article IV—Court of Impeachment—Judge Alcee L. Hastings)

GUILTY—67

Baucus
Bentsen
Bond
Boren
Boschwitz
Breaux
Bryan
Bumpers
Burns
Byrd
Chafee
Cochran
Cohen
Conrad
Danforth
Daschle
DeConcini
Dixon
Dole
Domenici
Durenberger
Exon
Ford
Fowler
Garn
Glenn
Gore
Gramm
Grassley
Hatfield
Heinz
Helms
Hollings
Humphrey
Inouye
Johnston
Kassebaum
Kasten
Kennedy
Kerrey
Kerry
Kohl
Lautenberg
Lugar
Matsunaga
McCain
McClure
McConnell
Mitchell
Murkowski
Nickles
Nunn
Pressler
Reid
Riegle
Robb
Rockefeller

Roth
Rudman
Sarbanes
Simon
Simpson
Stevens
Symms
Thurmond
Wallop
Warner

NOT GUILTY—28

Adams
Armstrong
Biden
Bingaman
Bradley
Burdick
Cranston
D'Amato
Dodd
Gorton
Graham
Harkin
Hatch
Heflin
Leahy
Levin
Lieberman
Metzenbaum
Mikulski
Moynihan
Packwood
Pell
Pryor
Sanford
Sasser
Shelby
Specter
Wirth

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—5

Coats
Jeffords
Lott
Mack
Wilson

The PRESIDENT pro tempore. Upon this article of impeachment, 67 Senators have voted guilty; 28 Senators have voted not guilty.

Two-thirds of the Senators present having voted guilty, the Senate adjudges the respondent, Alcee L. Hastings, guilty as charged in the fourth article.

ARTICLE V

The PRESIDENT pro tempore. The clerk will now read the fifth article of impeachment.

The bill clerk read as follows:

ARTICLE V

From January 18, 1989, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that Judge Hastings' appearance at the Fontainebleau Hotel in Miami Beach, Florida, on September 16, 1981, was not part of a plan to demonstrate his participation in a bribery scheme with William Borders of Washington, D.C., concerning *United States* v. *Romano*, a case tried before Judge Hastings, and that Judge Hastings expected to meet Mr. Borders at that place and on that occasion.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

VOTE ON ARTICLE V

The PRESIDENT pro tempore. The question is on the fifth article of impeachment. Senators, how say you? Is the respondent, Alcee L. Hastings, guilty or not guilty?

The clerk will call the roll.

The legislative clerk called the roll.

Mr. SIMPSON. I announce that the Senator from California [Mr. Wilson] is necessarily absent.

The PRESIDENT pro tempore. Have all Senators voted?

The result was announced—guilty 67, not guilty 28, as follows:

[Rollcall Vote No. 258]

(Subject: Article V—Court of Impeachment—Judge Alcee L. Hastings)

GUILTY—67

Baucus
Bentsen
Bond
Boren
Boschwitz
Breaux
Bryan
Bumpers
Burns
Byrd
Chafee
Cochran
Cohen
Danforth
Daschle
DeConcini
Dixon
Dole
Domenici
Durenberger
Exon
Ford
Fowler
Garn
Glenn
Gore
Gorton
Gramm
Grassley
Hatfield
Heinz
Helms
Hollings
Humphrey
Inouye
Johnston
Kassebaum
Kasten
Kennedy
Kerrey
Kerry
Kohl
Lautenberg
Lugar
Matsunaga
McCain
McClure
McConnell
Mitchell
Murkowski
Nickles
Nunn
Pressler
Reid
Riegle
Robb
Rockefeller
Roth
Rudman
Sarbanes
Simon
Simpson
Stevens
Symms
Thurmond
Wallop
Warner

NOT GUILTY—28

Adams
Armstrong
Biden
Bingaman
Bradley
Burdick
Conrad
Cranston
D'Amato
Dodd
Graham
Harkin
Hatch
Heflin
Leahy
Levin
Lieberman
Metzenbaum
Mikulski
Moynihan
Packwood
Pell
Pryor
Sanford
Sasser
Shelby
Specter
Wirth

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—5

Coats
Jeffords
Lott
Mack
Wilson

The PRESIDENT pro tempore. On this question, 67 Senators have voted guilty, 28 Senators have voted not guilty. Two-thirds of the Members present having voted guilty the verdict on article V is guilty.

ARTICLE VI

The PRESIDENT pro tempore. The clerk will read the sixth article of impeachment.

The legislative clerk read as follows:

ARTICLE VI

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to his oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that Judge Hastings did not expect William Borders, of Washington, D.C. to appear at Judge Hastings' room in the Sheraton Hotel in Washington, D.C., on September 12, 1981.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

VOTE ON ARTICLE VI

The PRESIDENT pro tempore. The question is on the sixth article of impeachment. Senators, how say you? Is the respondent, Alcee L. Hastings, guilty or not guilty?

The clerk will call the roll.

The bill clerk called the roll.

Mr. SIMPSON. I announce that the Senator from California [Mr. Wilson] is necessarily absent.

The PRESIDENT pro tempore. Are there other Senators wishing to vote?

The result was announced—guilty 48, not guilty 47, as follows:

[Rollcall Vote No. 259]

(Subject: Article VI—Court of Impeachment—Judge Alcee L. Hastings)

GUILTY—48

Baucus
Bentsen
Boren
Breaux
Bryan
Burns
Byrd
Chafee
Cochran
Danforth
Daschle
DeConcini
Dole
Exon
Ford
Fowler
Garn
Glenn
Gramm
Grassley
Hatfield
Helms
Hollings
Humphrey
Inouye
Johnston
Kassebaum
Kasten
Kerrey
Lugar
Matsunaga
McClure
Mitchell
Nickles
Pell
Pressler
Reid
Robb
Rockefeller
Roth
Sarbanes
Simon
Simpson
Stevens
Symms
Thurmond
Wallop
Warner

NOT GUILTY—47

Adams
Armstrong
Biden
Bingaman
Bond
Boschwitz
Bradley
Bumpers
Burdick
Cohen
Conrad
Cranston
D'Amato
Dixon
Dodd
Domenici
Durenberger
Gore
Gorton
Graham
Harkin
Hatch
Heflin
Heinz
Kennedy
Kerry
Kohl
Lautenberg
Leahy
Levin
Lieberman
McCain
McConnell
Metzenbaum
Mikulski
Moynihan
Murkowski
Nunn
Packwood
Pryor
Riegle
Rudman
Sanford
Sasser
Shelby
Specter
Wirth

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—5

Coats
Jeffords
Lott
Mack
Wilson

The PRESIDENT pro tempore. On this article of impeachment, 48 Senators have voted guilty; 47 Senators have voted not quilty. Less than two-thirds of the Members present having voted quilty, the Senate judges that the respondent, Alcee L. Hastings, is not quilty as charged in this article.

The majority leader is recognized.

Mr. Mitchell. Mr. President, under rule XXIII, if the person impeached shall be convicted upon any article by the votes of two-thirds of the Members present, the Senate may proceed to the consideration of such other matters as may be determined to be appropriate prior to pronouncing judgment.

The Rules Committee report accompanying the most recent changes in this rule, in 1986 stated:

Since, under the prevailing view a two-thirds vote to convict on any article operates as an automatic removal from office, the Senate may not wish to vote the other articles.

Accordingly, Mr. President, after reviewing the matter and discussing it with Senate counsel and the distinguished Republican leader, and the House counsel, it is my judgment that the Senate need not vote on every one of the articles of impeachment.

I have reviewed the articles, and I believe it appropriate that we continue voting through article IX, and that we also vote on articles XVI and XVII.

I, therefore, ask unanimous consent that the Senate not vote on articles X through XV inclusive of the articles of impeachment.

The President pro tempore. Is there objection?

The Chair hears none. It is so ordered.

Mr. Mitchell. Articles X through XV inclusive; not voting on those. We will continue voting through article IX and then to articles XVI and XVII, to conclude voting.

I thank my colleagues.

Mr. Levin. Mr. President, reserving the right to object, and I will not object, I had intended to vote guilty on article XV.

Mr. Mitchell. I thank the Senator.

The President pro tempore. Without objection, it is so ordered.

ARTICLE VII

The President pro tempore. The Clerk will read the seventh article of impeachment.

The bill clerk read as follows:

ARTICLE VII

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to his oath, made a false statement which was intended to mislead the trier of fact.

The false statement concerned Judge Hastings' motive for instructing a law clerk, Jeffrey Miller, to prepare an order on October 5, 1981, in *United States* v. *Romano,* a case tried before Judge Hastings, returning a substantial portion of property previously ordered forfeited by Judge Hastings. Judge Hastings stated in substance that he so instructed Mr. Miller primarily because Judge Hastings was concerned that the order would not be completed before Mr. Miller's scheduled departure, when in fact the instruction on October 5, 1981, to prepare such order was in furtherance of a bribery scheme concerning that case.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

VOTE ON ARTICLE VII

The PRESIDENT pro tempore. The question is on article VII.

Senators, how say you? Is the respondent, Alcee L. Hastings, guilty or not guilty?

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. SIMPSON. I announce that the Senator from California [Mr. Wilson] is necessarily absent.

The PRESIDENT pro tempore. Are there any other Senators in the Chamber who desire to vote?

The result was announced—guilty 69, not guilty 26, as follows:

[Rollcall Vote No. 260]

(Subject: Article VII—Court of Impeachment—Judge Alcee L. Hastings)

GUILTY—69

Baucus
Bentsen
Bond
Boren
Boschwitz
Breaux
Bryan
Bumpers
Burns
Byrd
Chafee
Cochran
Cohen
Conrad
Danforth
Daschle
DeConcini
Dixon
Dole
Domenici
Durenberger
Exon
Ford
Fowler
Garn
Glenn
Gore
Gorton
Gramm
Grassley
Hatfield
Heinz
Helms
Hollings
Humphrey
Inouye
Johnston
Kassebaum
Kasten
Kennedy
Kerrey
Kerry
Kohl
Lautenberg
Lugar
Matsunaga
McCain
McClure
McConnell
Mitchell
Murkowski
Nickles
Nunn
Pell
Pressler
Reid
Riegle
Robb
Rockefeller
Roth
Rudman
Sarbanes
Simon
Simpson
Stevens
Symms
Thurmond
Wallop
Warner

NOT GUILTY—26

Adams
Armstrong
Biden
Bingaman
Bradley
Burdick
Cranston
D'Amato
Dodd
Graham
Harkin
Hatch
Heflin
Leahy
Levin
Lieberman
Metzenbaum
Mikulski
Moynihan
Packwood
Pryor
Sanford
Sasser
Shelby
Specter
Wirth

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—5

Coats
Jeffords
Lott
Mack
Wilson

The PRESIDENT pro tempore. On this question, there are 69 guilty, 26 not guilty. Two-thirds of the Senators present having voted guilty, the verdict is guilty on article VII.

ARTICLE VIII

The PRESIDENT pro tempore. The clerk will read article VIII.

The assistant legislative clerk read as follows:

ARTICLE VIII

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to his oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that Judge Hastings' October 5, 1981, telephone conversation with William Borders, of Washington, DC, was in fact about writing letters to solicit assistance for Hemphill Pride of Columbia, South Carolina, when in fact it was a coded conversation in furtherance of a conspiracy with Mr. Borders to solicit a bribe from defendants in *United States* v. *Romano*, a case tried before Judge Hastings.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

VOTE ON ARTICLE VIII

The PRESIDENT pro tempore. The question is on the eighth article. Senators, how say you? Is the respondent, Alcee L. Hastings, guilty or not guilty? The clerk will call the roll.

The bill clerk called the roll.

Mr. SIMPSON. I announce that the Senator from California [Mr. Wilson] is necessarily absent.

The PRESIDENT pro tempore. Have all Senators in the Chamber voted?

The result was announced—guilty 68, not guilty 27, as follows:

[Rollcall Vote No. 261]

(Subject: Article VIII—Court of Impeachment—Judge Alcee L. Hastings)

GUILTY—68

Baucus
Bentsen
Bond
Boren
Boschwitz
Breaux
Bryan
Bumpers
Burns
Byrd
Chafee
Cochran
Cohen
Conrad
Danforth
Daschle
DeConcini
Dixon
Dole
Domenici
Exon
Ford
Fowler
Garn
Glenn
Gore
Gorton
Gramm
Grassley
Hatfield
Heinz
Helms
Hollings
Humphrey
Inouye
Johnston
Kassebaum
Kasten
Kennedy
Kerrey
Kerry
Kohl
Lautenberg
Lugar
Matsunaga
McCain
McClure
McConnell
Mitchell
Murkowski
Nickles
Nunn
Pell
Pressler
Reid
Riegle
Robb
Rockefeller
Roth
Rudman
Sarbanes
Simon
Simpson
Stevens
Symms
Thurmond
Wallop
Warner

NOT GUILTY—27

Adams
Armstrong
Biden
Bingaman
Bradley
Burdick
Cranston
D'Amato
Dodd

Durenberger
Graham
Harkin
Hatch
Heflin
Leahy
Levin
Lieberman
Metzenbaum
Mikulski
Moynihan
Packwood
Pryor
Sanford
Sasser
Shelby
Specter
Wirth

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—5

Coats
Jeffords
Lott
Mack
Wilson

The **President** pro tempore. On this question, there are 68 guilty, 27 not guilty. Two-thirds of the number present having voted guilty, the Senate adjudges that the respondent, Alcee L. Hastings, is guilty as charged on this article.

ARTICLE IX

The **President** pro tempore. The question now occurs on article IX, which the clerk will read.

The bill clerk read as follows:

ARTICLE IX

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to his oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that three documents that purported to be drafts of letters to assist Hemphill Pride, of Columbia, South Carolina, had been written by Judge Hastings on October 5, 1981, and were the letters referred to by Judge Hastings in his October 5, 1981, telephone conversation with William Borders, of Washington, D.C.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

VOTE ON ARTICLE IX

The **President** pro tempore. On article IX, Senators, how say you? Is the respondent Alcee L. Hastings guilty or not guilty. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. **Simpson**. I announce that the Senator from California [Mr. Wilson] is necessarily absent.

The **Presiding Officer**. Have all Senators in the Chamber voted?

The result was announced—guilty 70, not guilty 25, as follows:

[Rollcall Vote No. 262]

(Subject: Article IX—Court of Impeachment—Judge Alcee L. Hastings)

GUILTY—70

Baucus
Bentsen
Bond
Boren
Boschwitz
Breaux
Bryan
Bumpers
Burns
Byrd
Chafee
Cochran
Cohen
Conrad
Danforth
Daschle
DeConcini
Dixon
Dole
Domenici
Exon
Ford
Fowler
Garn
Glenn
Gore
Gorton
Gramm
Grassley
Hatfield
Heinz
Helms
Hollings

Humphrey
Inouye
Johnston
Kassebaum
Kasten
Kennedy
Kerrey
Kerry
Kohl
Lautenberg
Leahy
Levin
Lugar
Matsunaga
McCain
McClure
McConnell
Mitchell
Murkowski
Nickles
Nunn
Pell
Pressler
Reid
Riegle
Robb
Rockefeller
Roth
Rudman
Sarbanes
Simon
Simpson
Stevens
Symms
Thurmond
Wallop
Warner

NOT GUILTY—25

Adams
Armstrong
Biden
Bingaman
Bradley
Burdick
Cranston
D'Amato
Dodd
Durenberger
Graham
Harkin
Hatch
Heflin
Lieberman
Metzenbaum
Mikulski
Moynihan
Packwood
Pryor
Sanford
Sasser
Shelby
Specter
Wirth

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—5

Coats
Jeffords
Lott
Mack
Wilson

The PRESIDENT pro tempore. On the ninth article of impeachment, 70 Senators voted guilty, and 25 Senators voted not guilty.

Two-thirds of the Members having voted guilty, the verdict is guilty on article number IX.

ARTICLES OF IMPEACHMENT X THROUGH XV

The PRESIDENT pro tempore. Under the previous order, the Senate will not vote on articles X through XV inclusive.

ARTICLE XVI

The PRESIDENT pro tempore. The clerk will read article No. XVI.

The assistant legislative clerk read as follows:

ARTICLE XVI

From July 15, 1985, to September 15, 1985, Judge Hastings was the supervising judge of a wiretap instituted under chapter 119 of title 18, United States Code (added by title III of the Omnibus Crime Control and Safe Streets Act of 1968). The wiretap was part of certain investigations then being conducted by law enforcement agents of the United States.

As supervising judge, Judge Hastings learned highly confidential information obtained through the wiretap. The documents disclosing this information, presented to Judge Hastings as the supervising judge, were Judge Hastings' sole source of the highly confidential information.

On September 6, 1985, Judge Hastings revealed highly confidential information that he learned as the supervising judge of the wiretap, as follows: On the morning of September 6, 1985, Judge Hastings told Stephen Clark, the Mayor of Dade County, Florida, to stay away from Kevin "Waxy" Gordon, who was "hot" and was using the Mayor's name in Hialeah, Florida.

As a result of this improper disclosure, certain investigations then being conducted by law enforcement agents of the United States were thwarted and ultimately terminated.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

VOTE ON ARTICLE XVI

The **President** pro tempore. The question is on the 16th article of impeachment. Senators, how say you? Is the respondent, Alcee L. Hastings, guilty or not guilty?

The clerk will call the roll.

The legislative clerk called the roll.

Mr. **Simpson**. I announce that the Senator from California [Mr. Wilson] is necessarily absent.

The **President** pro tempore. Are there other Senators in the Chamber who desire to vote?

The result was announced—guilty 0, not guilty 95, as follows:

[Rollcall Vote No. 263]

(Subject: Article XVI—Court of Impeachment—Judge Alcee L. Hastings)

GUILTY—0

NOT GUILTY—95

Adams
Armstrong
Baucus
Bentsen
Biden
Bingaman
Bond
Boren
Boschwitz
Bradley
Breaux
Bryan
Bumpers
Burdick
Burns
Byrd
Chafee
Cochran
Cohen
Conrad
Cranston
D'Amato
Danforth
Daschle
DeConcini
Dixon
Dodd
Dole
Domenici
Durenberger
Exon
Ford
Fowler
Garn
Glenn
Gore
Gorton
Graham
Gramm
Grassley
Harkin
Hatch
Hatfield
Heflin
Heinz
Helms
Hollings
Humphrey
Inouye
Johnston
Kassebaum
Kasten
Kennedy
Kerrey
Kerry
Kohl
Lautenberg
Leahy
Levin
Lieberman
Lugar
Matsunaga
McCain
McClure
McConnell
Metzenbaum
Mikulski
Mitchell
Moynihan
Murkowski
Nickles
Nunn
Packwood
Pell
Pressler
Pryor
Reid
Riegle
Robb
Rockefeller
Roth
Rudman
Sanford
Sarbanes
Sasser
Shelby
Simon
Simpson
Specter
Stevens
Symms
Thurmond
Wallop
Warner
Wirth

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—5

Coats
Jeffords
Lott
Mack
Wilson

The **President** pro tempore. Have all Senators in the Chamber voted?

On this question, no Senators have voted guilty; 95 Senators have voted not guilty. The verdict on article number XVI is not guilty.

ARTICLE XVII

The **President** pro tempore. The question occurs on the 17th and final article, which the clerk will read.

The legislative clerk read as follows:

ARTICLE XVII

Judge Hastings, who as a Federal judge is required to enforce and obey the Constitution and laws of the United States, to uphold the integrity of the judiciary, to avoid impropriety and the appearance of impropriety, and to perform the duties of his office impartially, did, through—

(1) a corrupt relationship with William Borders of Washington, D.C.;

(2) repeated false testimony under oath at Judge Hastings' criminal trial;

(3) fabrication of false documents which were submitted as evidence at his criminal trial; and

(4) improper disclosure of confidential information acquired by him as supervisory judge of a wiretap;

undermine confidence in the integrity and impartiality of the judiciary and betray the trust of the people of the United States, thereby bringing disrepute on the Federal courts and the administration of justice by the Federal courts.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

VOTE ON ARTICLE XVII

The **President** pro tempore. On the 17th Article of Impeachment, Senators, How say you? Is the respondent, Alcee L. Hastings, guilty or not guilty? The clerk will call the roll.

Mr. Chafee addressed the Chair.

The **President** pro tempore. The Senator from Rhode Island.

Mr. **Chafee**. Mr. President, a parliamentary inquiry.

The **President** pro tempore. The Senator will state it.

Mr. **Chafee**. To find guilty on this article, does one have to agree with each of the four allegations?

The **President** pro tempore. This is for each Senator to determine in his own mind and in his own conscience and in accordance with his oath that he will do impartial justice under the Constitution and law.

It is the Chair's opinion, if the Senator in his own conscience and based on the facts as he understands them determines that, on any one of the paragraphs, Judge Alcee L. Hastings has undermined confidence in the integrity and impartiality of the judiciary and betrayed the trust of the people of the United States, he should vote accordingly.

Mr. **Leahy**. Mr. President, a further parliamentary inquiry.

The **President** pro tempore. The Senator from Vermont will State his parliamentary inquiry.

Mr. **Leahy**. Is the Senator from Vermont correct in understanding what the distinguished Presiding Officer said earlier that, if a Senator felt that to vote guilty on this he would have to find on each and every one, he would be within his rights to set for himself that as the standard?

The **President** pro tempore. The Chair has not rendered any such opinion.

Mr. **Leahy**. A further parliamentary inquiry.

The **President** pro tempore. The Senator will state it.

Mr. **Leahy**. Mr. President, would a Senator be within his or her rights to interpret this as saying that a guilty or not guilty verdict would have to be based on a finding on each one of the four items as either guilty or not guilty?

The **President** pro tempore. The Senator would be within his or her right to so find.

Mr. **Leahy**. I thank the Chair.

The **President** pro tempore. The clerk has read article XVII.

The question is, Senators, how say you? Is the respondent, Alcee L. Hastings, guilty or not guilty?

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. **Simpson**. I announce that the Senator from California [Mr. **Wilson**] is necessarily absent.

The **President** pro tempore. Have all Senators voted?

The result was announced—guilty 60, not guilty 35, as follows:

[Rollcall Vote No. 264]

(Subject: Article XVII—Court of Impeachment—Judge Alcee L. Hastings)

GUILTY—60

Baucus
Bond
Boren
Boschwitz
Bumpers
Burns
Byrd
Chafee
Cochran
Cohen
Conrad
Danforth
DeConcini
Dixon
Dole
Domenici
Durenberger
Exon
Ford
Fowler
Garn
Glenn
Gorton
Gramm
Grassley
Hatfield
Heinz
Helms
Hollings
Humphrey
Inouye
Johnston
Kassebaum
Kasten
Kennedy
Kerrey
Kerry
Kohl
Lautenberg
Levin
Lugar
McCain
McClure
McConnell
Murkowski
Nickles
Nunn
Pressler
Riegle
Robb
Rockefeller
Roth
Rudman
Sarbanes
Simpson
Stevens
Symms
Thurmond
Wallop
Warner

NOT GUILTY—35

Adams
Armstrong
Bentsen
Biden
Bingaman
Bradley
Breaux
Bryan
Burdick
Cranston
D'Amato
Daschle
Dodd
Gore
Graham
Harkin
Hatch
Heflin
Leahy
Lieberman
Matsunaga
Metzenbaum
Mikulski
Mitchell
Moynihan
Packwood
Pell
Pryor
Reid
Sanford
Sasser
Shelby
Simon
Specter
Wirth

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—5

Coats
Jeffords
Lott
Mack
Wilson

The **President** pro tempore. On the 17th article, 60 Senators having voted guilty, 35 Senators having voting not guilty. Less than two-thirds of the Members present having voted guilty, the Senate adjudges that the respondent, Alcee L. Hastings, is not guilty as charged in the article.

May there be order in the Senate? The Senate will be in order.

JUDGMENT

The **President** pro tempore. The Chair directs the judgment to be entered in accordance with the judgment of the Senate as follows:

The Senate, having tried Alcee L. Hastings, U.S. district judge for the Southern District of Florida, upon 17 articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senate present having found him guilty of the charges contained in articles I, II, III, IV, V, VII, VIII, and IX of the articles of impeachment: It is therefore,

Ordered and adjudged, That the said Alcee L. Hastings be, and is hereby, removed from office.

The majority leader is recognized.

Mr. **Mitchell**. Mr. President, I send an order to the desk and ask that it be stated.

The **President** pro tempore. The clerk will report the order.

The legislative clerk read as follows:

> *Ordered*, That the Secretary be directed to communicate to the Secretary of State, as provided by Rule XXIII of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, and also to the House of Representatives the judgment of the Senate in the case of Alcee L. Hastings, and transmit a certified copy of the judgment to each.

The **President** pro tempore. Without objection, the order will be entered.

The majority leader is recognized.

ADJOURNMENT SINE DIE OF COURT OF IMPEACHMENT

Mr. **Mitchell**. Mr. President, I move that the Senate, sitting as a court of impeachment for the articles against Alcee L. Hastings, adjourn sine die.

The motion was agreed to; and, at 12:15 p.m., the Senate, sitting as a court of impeachment, adjourned sine die.

[The judgment and order follow:]

In the Senate of the United States,

October 20 (legislative day, September 18), 1989

JUDGMENT

The Senate having tried Alcee L. Hastings, United States District Judge for the Southern District of Florida, upon seventeen Articles of Impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present having found him guilty of the charges contained in Articles I, II, III, IV, V, VII, VIII, and IX of the Articles of Impeachment: It is therefore,

Ordered and adjudged, That the said Alcee L. Hastings be, and he is hereby, removed from office.

Attest:

Walter J. Stewart
Secretary.

In the Senate of the United States,

October 20 (legislative day, September 18), 1989

Ordered, That the Secretary be directed to communicate to the Secretary of State, as provided by Rule XXIII of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, and also to the House of Representatives the judgment of the Senate in the case of Alcee L. Hastings, and transmit a certified copy of the judgment to each.

Attest:

Walter J. Stewart

Secretary.

STATEMENTS OF SENATORS FOR THE RECORD REGARDING THE IMPEACHMENT TRIAL OF JUDGE ALCEE L. HASTINGS

AUTHORIZATION FOR FILING STATEMENT REGARDING THE IMPEACHMENT TRIAL OF JUDGE ALCEE L. HASTINGS

[From the Congressional Record—Senate, October 20, 1989]

Mr. MITCHELL. Before proceeding to the voting, I ask unanimous consent that Senators may be permitted, within 7 days from today, to have printed in the Record opinions or statements explaining their votes.

The PRESIDENT pro tempore. Hearing no objection, it is so ordered.

The majority leader is recognized.

STATEMENT OF SENATOR JEFF BINGAMAN

Mr. BINGAMAN. Mr. President, I would like to take a few moments. I know I have colleagues who are waiting to speak. I wanted to thank and compliment the staff of our committee, the Impeachment Committee, that considered the articles against Alcee L. Hastings.

First I want to compliment and thank the vice chair, the Senator from Pennsylvania [Mr. Specter], for the excellent work that he did on the committee and the leadership he provided. It was a pleasure to work with him, and as always I was extremely impressed with his legal mind and his conscientious approach to the very difficult issue we had.

I also want to thank the other committee members. I believe we had a very attentive and conscientious committee. We worked hard at preparing a good record so the Senate could consider this matter appropriately, and I believe we did so.

I also thank the counsel that helped us. Mike Davidson, of course, who is the Senate counsel, did a superb job, as he always does. I appreciate that.

In addition we had counsel for the Impeachment Committee, Elaine Stone, Mark Klugheit, and Bruce McBarnette, who, all three, helped tremendously with our understanding of the facts and our preparation of the record to present to the Senate, and the preparation of the statements we made to the Senate.

Also I want to thank the staff of the Impeachment Committee, Tony Harvey, from the Rules Committee, Casey McGannon, Isabel McVeigh, Angela Muenzer, Marilyn Poku, and many others who worked with them. I think their work was superb.

As I have indicated in other places, I also believe the House managers and their attorneys did an excellent job, and Judge Hastings and his attorneys certainly did a very professional job presenting their case as well.

Mr. President, I have voted "not guilty" on each of the 17 articles of impeachment presented by the House against Judge Alcee

L. Hastings. I will take a few minutes of the Senate's time to explain my reasons.

The charges brought by the House against Judge Hastings are extremely serious. He is accused, in effect, of having sold his office in the hope of financial gain in 1981, of having lied repeatedly from the witness stand when brought to trial on bribery conspiracy charges in 1983, and of having disclosed confidential information presented to him in his capacity as the supervising judge of a Federal wiretap in 1985. In short, he stands accused of a repeated betrayal of the public trust. If guilty of these offenses, he surely has no place on the Federal bench.

However, after listening to nearly 4 weeks of testimony and reading and reviewing both the evidence and the submissions of the parties, I do not find that the evidence presented constitutes adequate proof that Judge Hastings is guilty of the charges against him. That feeling is not the product of any want of diligence on the part of the House managers. They and their counsel have prosecuted this case with skill and with care. Nor is that feeling the product of any notion that the case against Judge Hastings has been pursued for improper purpose. I believe that the judges of the U.S. Court of Appeals for the Eleventh Circuit who were appointed to serve as an investigating committee into the bribery conspiracy and false statement charges, as well as the House of Representatives, properly concluded that there was sufficient evidence of possible wrongdoing so as to merit the filing of articles of impeachment against Judge Hastings. It is simply my conclusion that the evidence, although furnishing grounds for investigation and trial, does not provide a sound basis upon which I can vote for conviction.

Our system of jurisprudence requires that in any proceeding in which serious charges of wrongdoing are leveled against an individual, two basic principles apply. First is the bedrock principle that each individual is presumed innocent of charges brought against him unless adequate proof is presented to the contrary.

Here, perhaps due to the particular circumstances of this proceeding, I found that that principle remained, as it should, in the forefront as we considered the evidence. Judge Hastings came before the Senate accused of having conspired to solicit a bribe from two criminal defendants in his court. In 1983, a jury had acquitted him of that same charge. I do not subscribe to the view that that verdict was binding upon the Senate, or that we should deem it conclusive on the question of Judge Hastings' guilt or innocence. Our responsibility was different from that of the jury which heard the criminal charges against Judge Hastings, and I do not believe that its determination that guilt had not been proven beyond a reasonable doubt relieved us of our burden to determine whether Judge Hastings had been shown unfit to hold his high position of public trust. But that jury verdict did serve as an ever-present reminder that Judge Hastings, as any accused, stood before us a presumptively innocent man.

The second fundamental principle, a corollary of the first, is that when the Government accuses an individual of wrongdoing, it must shoulder the burden of proving that the accused is truly guilty of the charge. That is true whether the individual is on trial for the alleged violation of the criminal laws or is before the Senate on articles of impeachment.

Counsel for Judge Hastings has argued that it may be proper to require proof beyond a reasonable doubt in order to remove him from office. But this is not a criminal proceeding in which the prosecutor should be held to proof beyond a reasonable doubt. Judge Hastings is not here in jeopardy of his life or personal liberty.

On the other hand, I am not persuaded by the House managers' contention that we should be guided by a simple preponderance of the evidence standard. That standard would permit removal upon the conclusion that it is more probable than not that Judge Hastings engaged in the wrongdoing with which he is charged. This is not a routine civil case, where, for example, a property dispute between two individuals must be resolved. Extremely important interests, both private and public, are at stake. For Judge Hastings, his Federal judgeship, his ability to serve in other positions of public service and his reputation are all at risk. For the public, its interests lie not only in seeing that judges who are unworthy of its trust are removed from office, but also, that its judges can make the difficult decisions that are demanded of them, knowing that they cannot lightly be swept from office.

For me, the proper measure in this case falls somewhere between proof beyond a reasonable doubt and a simple weighing of probabilities. Whether that place be called "clear and convincing" or some other legal standard be formulated, it is, at bottom, simply that point along the continuum where we would feel sufficiently convinced that Judge Hastings committed the offense of which he stands accused, so that our duty would lie in favor of his removal. For each of us, that may well be a different place, and I suspect that there will be different judgments made upon this body of evidence. But for me, the proof did not carry me to the necessary degree of certainty.

Article I of the articles of impeachment charges Judge Hastings with having conspired with William Borders to solicit a bribe from Frank and Tom Romano, two brothers whose criminal case was pending before Judge Hastings. The House managers' proof on article I is circumstantial. William Borders has refused to testify in response to the Impeachment Trial Committee's subpoena, choosing incarceration instead. We are left with no testimony from any witness who claims to have heard any discussion between Judge Hastings and William Borders which, on its face, plainly pertained to the alleged conspiracy. We likewise have no piece of physical evidence which documents any such discussion.

The closest we come to anything that could even be urged as direct evidence of Judge Hasting's involvement in the conspiracy is the conversation between the two on October 5, 1981. The conversation, at face value, concerns Judge Hastings' having drafted letters to assist their mutual friend, Hemphill Pride. It is said by the House, however, to be a coded discussion in which Borders tells Judge Hastings that the bribery deal is still on track, even though the judge was late in issuing the *Romano* forfeiture order that Borders had promised. According to the House, Judge Hastings' statement that he has drafted the "letters to Hemp" means that the *Romano* order has been written, Borders' statement that "he wrote some things down for me," is a reference to the $25,000 downpayment that he received from the undercover agent on September 19, and Borders' comment that "I was supposed to go back and get some more things," is a reference to the arrangement, made on September 19, that he would return for the balance of the bribe money.

I am not persuaded. It seems unlikely to me that Judge Hastings and Borders would have constructed a code as a means of communication with one another and then have used it over their own telephones, particularly in light of evidence that Judge Hastings had some concern that his telephones were tapped and that Borders had a well-developed system of making pay phone to pay phone calls. I also find the House manager's interpretation of the conversation to be strained. It strikes me as implausible that Borders, in order to deliver the simple message that the deal was still on, would elaborately relay information that was already more than 2 weeks old. Having listened to and examined the words of that converstation, I find it arguably innocuous, and in any event, too ambiguous to be treated as significant evidence of guilt.

What we do have in this case is an array of circumstantial proof from which inferences of guilt could be drawn. We have a pattern of contacts between Judge Hastings and William Borders whose timing appears suspicious when set against both the backdrop of what was transpiring in the *Romano* case and Borders' corrupt dealings. But the mere fact that these two men, who had a longstanding professional and personal relationship, were in contact does not prove Judge Hastings' involvement in the conspiracy. I am particularly troubled by the fact that, as both sides would agree, the evidence does not reveal the totality of the contacts between Judge Hastings and Borders. It is thus possible that the suspiciousness of the timing of the contacts that are documented in this record is more apparent than real.

We also have a number of events and circumstances, such as the three "shows of proof" allegedly made by Judge Hastings to signal his complicity and the fact that Borders obviously had a source which give him "inside information" about the *Romano* case, which can be seen as evidence of Judge Hasting's involvement in Borders' corrupt scheme. But for me, those events and circumstances are not sufficiently convincing as proof of guilt.

The "shows of proof," while arguably suspicious, are ambiguous. Judge Hastings continued the Romanos' sentencing in May 1981, as Borders had predicted, but the Romanos' lawyers asked the judge for that relief and there is little, if any, proof that the judge would have known that their lawyer would make such a motion. Judge Hastings did appear at the Fontainebleau as promised by Borders, but that appearance may only signify Borders' skill as a manipulator. Judge Hastings did issue an order returning a substantial portion of the Romanos' forfeited property, as Borders said he would do, but the content of that order was consistent with the law and the delay in its issuance can be explained by other factors. Indeed, the fact that that order was issued a week later than Borders had promised is difficult to reconcile with the picture painted by the House of Judge Hastings and Borders in steady contact to work through the details of the alleged conspiracy. And although Judge

Hastings is unable to do more than conjecture as to how Borders came to know detailed information about the case, if not for him, that is not something which, presuming him innocent, he should be expected to know and explain to us.

Judge Hastings' agitated reaction when he learned of Borders' arrest on October 9 is also troubling. But although his response may not be what I would expect of myself in like circumstances, I do not see his hurried return to his home as convincing evidence that he was distraught and quilty, rather than merely distraught.

Set against the foregoing evidence, is evidence from which an inference of innocence could well be drawn. The evidence showed that Judge Hastings was living within his means and had led a life devoted less to financial gain than to community service. There was no evidence of past misdeeds and no evidence that Judge Hastings' character rendered him at all likely to embroil himself in the serious wrongdoing of which he is here accused.

In sum, too often for my satisfaction, House managers take the view that it is sufficient to prove circumstances from which guilt could be inferred, and at that point, they argue the burden shifts to Judge Hastings to establish his innocence. For example, with regard to the May 11 continuance, the House does not prove that Judge Hastings gave Borders information on his intended action. Rather it points to the testimony of the Romanos' lawyer, "Neal Sonnett, members of his firm and staff and the judge's staff" to the effect that they did not provide the information, and then argues that Judge Hastings has failed to demonstrate a reason "why those persons should not be believed." Similarly, the House managers argue that on September 11, Judge Hastings and Borders met at National Airport to discuss their bribery scheme. But there is no proof of such a meeting. The proof is that the meeting could have occurred and then the argument is made that Judge Hastings has failed to adequately demonstrate that it did not happen.

The question before the Senate on article I, and on each of the other articles as well, is not which version of events—that offered by the House or that offered by Judge Hastings—is more plausible. The question instead is whether the evidence presented by the House satisfied its burden of proof to the satisfaction of two-thirds of the Members of this body. For my part, it does not.

Having concluded that I will vote to acquit on article I, I see no basis for a conviction on any of the false statement articles. The House managers, in their post-trial memorandum, urge that a conviction could be appropriate on article VI and articles X through XV, even after a vote to acquit on article I. However, for each of those articles, I find either insufficient proof that Judge Hastings' testimony was false or, where particular aspects of his testimony were incorrect, insufficient proof that he purposefully lied from the witness stand.

Article XVI contains a charge independent of the 15 articles which precede it. Article XVI charges that in September 1985, Judge Hastings disclosed confidential information to Mayor Stephen Clark, of Dade County, FL, which the judge had learned while supervising a federally authorized wiretap. Mayor Clark so testified. The evidence, however, establishes that Judge Hastings could not have made the disclosure either at the time when, or in the manner which, Mayor Clark claims that that disclosure occurred. That gaping hole in the proof had not been remedied to my satisfaction by the other proof submitted by the House. I am also troubled by the failure of the House to identify any credible motive for the alleged disclosure. In my view, a vote to convict on article XVI would require reliance on speculation, not proof, and I shall accordingly vote to acquit Judge Hastings of this charge.

I will also vote to acquit on article XVII. Having concluded that the proof is insufficient to establish that Judge Hastings is guilty of any of the preceding articles of impeachment, each of which accuses him of a very specific act or wrongdoing, I am unwilling to vote that the whole—embodied in article XVII—somehow equals more than the sum of its parts.

The oath of each Senator in the consideration of impeachment articles is to "do impartial justice according to the Constitution and laws"—rule XXV, Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials. To my mind that means each Senator must consider the evidence, weigh it in light of his own experiences, and determine whether the guilt of the respondent has been established. I conclude that in this case the evidence falls short.

Mr. President, I yield the floor.

ORAL STATEMENT MADE BY SENATOR SPECTER DURING THE SENATE DELIBERATION ON OCTOBER 19, 1989

Mr. Specter. Mr. President, earlier today I circulated a statement on my position, and did so because of the absence of any committee report, trying to summarize my own views cutting down a 6,000-page Record to about 1 percent. And as noted in that statement, I agree with what the chairman, Senator Bingaman, has concluded, and that is to find the respondent not guilty on all the charges.

Historically, I think it is significant to note that the Senate has not paid great deference to the indicting process or articles of impeachment by the House. With some nine Federal judges having been tried by the Senate, five have been convicted and four have been acquitted. My own view is that the case turns on the hard evidence and on that alone.

I comment very briefly about the speech by Congressman Conyers yesterday which I thought directed itself to an issue not in this case. At no time has Judge Hastings ever contended before the Senate committee that he was the victim of racism. That has not been the issue, and I do not think that knocking that issue down is in any way relevant to these proceedings.

There was a 413-to-3 vote by the House. Starting with the issue of wiretap disclosure, I think it is fair to say that was extremely thin. Having been a party to many 99-to-nothing votes, I do not want to comment too much about those lopsided votes. But I call that to the attention of this body in terms of not paying extraordinary deference to that vote, at least by analogy or reference to the wiretap disclosure issue which I believe you will find to be totally unsubstantial.

Nor would I pay great deference to what the Eleventh Circuit Judicial Council has done. If you take a look at those proceedings,* while not relevant here, it brings us really to the issues in this case.

I have devoted substantial thought and research to the issue of double jeopardy and the issue of delay and have commented about that extensively in the paper that I have submitted. But in my final thinking, I have not based my decision on that because I think there is a narrower ground and that is the ground of analyzing the evidence in the case.

On the issue of what is the appropriate burden of proof, it is my conclusion that that is proof beyond a reasonable doubt and I do so find for a number of reasons.

One reason is the practicality; another is the history; and a third is the verdict of acquittal which has been rendered by a jury in this case, substantially the same case. I believe that the jury acquittal is entitled to great deference because he has been tried and this process is an 8-year process, having started in 1981, running through slightly more than 8 years as we are here today following the incidents of October 9, 1981.

My research carried me back to the Constitutional Convention where the impeachment process was defined, and I found quite a number of comments relating to punishment which I think to be highly significant—Madison, Franklin, Randolph, Morris, and Boudinot. Madison commented that "the case of impeachment will reach the culprit and drag him forth to punishment."

I would note that in our rollcall on Claiborne we were asked to say guilty or not guilty, and the provision of the Constitution calling for impeachment refers to the party convicted.

The closest case that I can find to this kind of a situation is the *Winship* decision by the Supreme Court in 1969 which involves delinquency adjudications which are civil in nature for whatever that means. The Supreme Court there said that notwithstanding the fact that it being civil, and it is not to punish, that there is a requirement of proof beyond a reasonable doubt.

Mr. President, I do not know that it is really determinative what standards you articulate. I think that we say in criminal trials that it is proof beyond a reasonable doubt, but it is very hard for juries to really assess what that means as you apply it to the facts, or present the standard of proof by a preponderance of the evidence, and in a fraud case by clear and convincing evidence. It really comes down to a judgment call as to what you think about the evidence.

I am not sure that the evidence meets any standard here; but I think that where you have a judge up for removal, the issue of judicial independence requires a very strict standard. This is not a question of whether we would confirm him if he were before us, today. It is not a question of whether we feel comfortable in going before him, but a question of whether we are going to oust him from office that comes into play. I do not have to lecture this group on the very critical issue of separation of power. I think it has to be exercised with great restraint.

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*As noted in the Appendix to this statement, the Eleventh Circuit proceedings leave much to be desired.

Now for the evidence, Mr. President: The central charge is conspiracy to take a bribe to influence a case. There is no evidence of any money going to Judge Hastings. The remittance of the forfeiture was clearly required by the existing law. There has been no direct evidence of a conspiracy. That does not end the issue, however, because even circumstantial evidence can establish a case. But I think it is highly probative that there is no showing of any money to Hastings, and that he did not do anything not required by the existing law on sending back forfeiture.

There are two parties to the alleged conspiracy, Judge Hastings and Bill Borders. I think it was a superb performance by Congressman Bryant, and I called him up this morning to tell him so, told him what I intended to do. Nonetheless, I was surprised to hear him argue that there was an adverse influence against Judge Hastings because Borders did not testify, because I believe very strongly that the House did not do what it should have done in bringing Borders forward as a witness. They made some efforts to get him to testify. He first begged off saying that he was under probation. Then the House managers waited for the probation to lapse and went back to him again. They did not seek to compel his testimony by moving for criminal contempt, which they could have. They say they do not have civil contempt powers as we do. But it was only the Senate committee which brought Borders to the hearing, and, as we meet here this afternoon, Borders is in jail on a civil contempt citation.

We are obviously here to find the facts and do justice. But the House has every bit as much duty in that respect as does the Senate.

The prosecuting attorney is a quasi-judicial official who has a responsibility to do justice. It is more than just being an advocate. I go into this issue at some length in the written statement.

And, finally, I do not give any weight on either side to the absence of Border as a witness; but I do not think it is fair to raise an inference against Judge Hastings in the context of what the House did or did not do.

What is the circumstantial evidence? It is very hard to go into very much of this in a limited timeframe, but we will have time for more discussion. The question of motive: What motive does Judge Hastings have to jeopardize his position? $150,000 divided with someone else? There is some speculation that perhaps he was not even doing it for money himself but only for Borders.

Here is a man who devoted his life to public service, a lot of civil rights causes, lived with his mother, was very frugal, took the job as a judge because it brought more pay, is perhaps one of the few judges who is not lobbying for a pay increase. There is nothing in this man's background to suggest that he would put himself at risk for this money.

The House argued that there were three offers of proof that Borders controlled Hastings. I found the evidence at the Fontainebleau Hotel highly suspicious. They discussed the issue of the remittance order which was issued. But the key factor on the order was that it was supposed to have been issued within 10 days, and it was clear it was totally within the power of Judge Hastings to issue the order if he wanted to.

The evidence showed that his clerk, Jeffrey Miller, has discussed with him the order shortly after a Fifth Circuit opinion on August 27 at which time Judge Hastings said prepare the order.

The House brief argued a third issue and that was the issue of a continuance which they did not present at their oral argument but I believe that our burden is to look at all the evidence.

Borders allegedly said to the FBI undercover agent the case will be continued *sua sponte* on the motion of the judge by himself. That did not happen. An application for the continuance was made by the defense lawyer, Neal Sonnett. What does the House say about that? On page 58 of their brief, they say Neal Sonnett may have orally notified Chambers of his desire for a continuance by the close of business on May 8, 1981. That obviously is wholly speculative.

On the important conversation of October 5, between Hastings and Borders at 5:12, there was an earlier conversation at 4:22 where Borders told Rico that the deal was set, before he talked to Hastings. So how did he know that? Page 65, the House submits that on October 4 there was a conversation between Borders and Hastings. There is no evidence of that. Had that conversation occurred, what is the need for the October 5 conversation?

There has been extensive discussion on the Hemphill Pride letters. Our Senate committee counsel, Mark Klugleit, pointed out to me that they were perfect and pristine.

I raised that question to Judge Hastings. Hastings made an explanation, and, as many of his explanations were, it was not entirely satisfactory. He then contended that he had shown them to John Shorter, Borders' lawyer, and Shorter confirmed that he was shown the yellow pad which appeared to be the letters. The House brief then assumes that Shorter did not use those letters because he considered them to be fabricated. That is an important factor in the case.

I refer to these items of evidence illustratively. I know it is very hard to grasp them all in the context of this kind of a discussion. They are set forth in the written materials that I have submitted to you. But I believe you will find that on these items which are key to the House case there are speculative inferences which the House engages in.

Then there is the issue of his lack of passion. Again, that is raised by the Senate committee. I raised it with Judge Hastings. He said nobody had asked him about it. Even as he spoke, there was not any passion. I found that surprising; I found it troublesome.

Then I reflect on it, and I am not sure, is it more in sorrow than in anger? But again, it is not the kind of compelling or even clear and convincing evidence.

Then there is the incident of his departure from Washington, DC.

When Judge Hastings was advised on October 9 that his friend, Bill Borders, had been arrested on a charge of a bride committed in his courtroom, he did panic, beyond any question. But there is a lot of experience about the innocent panicking, as well as the guilty panicking.

He went to a number of pay telephones in the airport and he called Patricia Williams, his lawyer—also another relationship—and he moved from one pay phone to another in a totally inexplicable way.

If he had reason to think that Patricia Williams' phone was being tapped, he had a right to talk to his lawyer in a confidential way. What inference may appropriately be drawn for someone exercising care to be sure that his communication with his lawyer is not overheard?

If someone is about to be questioned by the FBI, I suggest that they do not respond like Judge Hastings did. It did not make a lot of sense. What someone ought to do is say to the FBI, if you want to talk, I will talk to you at a mutually convenient time.

Anybody, guilty or innocent, being asked for an interview with the FBI, who does not then consult counsel and prepare himself, is foolish. That is not the sort of thing anybody wants to rush in and do on the spur of the moment, without consulting counsel and without reflecting on the subject.

Again, it may mean that the House did not articulate the best reason for Judge Hastings' attitude. This, again, comes from counsel of the Senate committee who raises the question: maybe what Judge Hastings really wanted to do was find out what Mr. Borders told the FBI before Judge Hastings submitted to an interview. That might have been a reason which would suggest guilt, and that might have been his reason.

I submit that to you, although, it is on the other side of the ledger from my own view, but I do not think you can speculate about that. When Judge Hastings responded as he did, which was in absolute panic and in irrational panic, that does not suggest to me necessarily that he is guilty.

Where you have a key witness in the case like William Dredge, I think it is important to note that this man has a very extensive criminal record. The committee went to great length to question him. When you get to Dredge's testimony, I suggest you take it with great caution.

At the time he was working with Borders, he was under indictment for distributing drugs, quaaludes, for which he ultimately received a sentence of probation because of his cooperation on the Hastings case. He has a record going back to 1943. He was convicted after being charged with armed robbery, convicted on a later assault with a deadly weapon charge, later in the 1950's, he served 5 years for false payroll checks. The incriminating evidence submitted by Mr. Dredge has to be taken with a super abundance of caution.

Now, Mr. President, in essence, when you take a look at this case, I believe that there are a great many highly suspicious factors. I have summarized them in the statement which I have submitted, but in toto, they constitute, as I view it, only a partial web. And to remove a Federal judge from office, it is my thinking that there cannot be speculation, and there cannot be assumptions at the central part of the prosecution's case.

Because of those factors here, it is my considered view that this man ought to be found not guilty. I thank the Chair.

STATEMENT OF SENATOR SPECTER EXPLAINING HIS VOTES ON OCTOBER 20, 1989

Mr. SPECTER. Mr. President, I thank the distinguished Senator from New Mexico [Mr. Bingaman] for his kind remarks. I have the utmost admiration for the job which the chairman, Senator Bingaman, did, in the discharge of the duties of the impeachment trial.

The full committee attended to its duties with vigor, diligence and commitment. I would like to pay special thanks to the very devoted staff of the committee: Michael Davidson, Senate Legal Counsel, performed admirably, as did Anthony Harvey; the administrator; Elaine Stone, counsel; Bruce McBarnette, counsel. I ask, Mr. President, there be printed in the Record at this point the list of all of the staff members, each of whom are due accolades for their work on this committee.

There being no objection, the material was ordered to be printed in the Record, as follows:

IMPEACHMENT TRIAL COMMITTEE

Michael Davidson, Senate Legal Counsel.
Anthony L. Harvey, Administrator.
Elaine W. Stone, Counsel
Mark A. Klugheit, Counsel.
Bruce O. McBarnette, Counsel.
P. Casey McGannon, Staff Assistant and Exhibits Clerk.
Isabel T. McVeigh, Staff Assistant and Journal Clerk.
Angela Muenzer, Staff Assistant..
Marilyn Poku, Staff Assistant.

MEMBERS' STAFF REPRESENTATIVES

Senator Bingaman, Chairman, Patrick Von Bargen.
Senator Leahy, Cathy Russell and Mark Gerchick
Senator Pryor, John Monahan.
Senator Bryan, John Forrest.
Senator Kerrey, William Hoppner.
Senator Lieberman, John Nakahata and Aaron Bayer.
Senator Specter, Vice Chairman, Ron Weich.
Senator Durenberger, Edward Garvey and Joshua Levy.
Senator Rudman, Jim Farrell and Jonathan Page.
Senator Bond, Chris Leritz.
Senator Gorton, Anthony Lowe.
Senator Burns, Lori Bass.

INTERNS

Troy Oechsner, Jeffrey Rackow, Andrea Wintroub, Marc McCaskill.

PAGES

Michelle Jenner, Johnnie Kaberle.

Mr. SPECTER. I would like to express thanks to Mark Klugheit, a former partner of mine with Dechert, Price & Rhoads, who came to Washington and worked unstintingly and very effectively. He did an outstanding job.

Mr. President, when I undertook this assignment I had a preconception that the impeachment process ought to be delegated to some other body. I thought, at that time, that it ought not be the responsibility of the U.S. Congress. We should not take the time of the U.S. House of Representatives to refer articles of impeachment, or should not take the time of the U.S. Senate to hear the matter and make an adjudication.

After participating in this process I have revised my thinking. Obviously the Congress is very busy. We had an enormously busy month in July, in the Senate. But we found time to discharge these duties, and yesterday the Senate went into closed session at 2 and worked until approximately 9:30. The attendance was excellent at the outset. Not unexpectedly, as the hours grew long fewer Senators were in attendance. There was excellent debate, and I think the record will show the Senate acquitted itself very well.

We took on many issues of importance. We have oversight responsibilities which we really cannot discharge in depth which we ought to. But the impeachment process gave us a good opportunity to look at many branches of Government, including the Eleventh Circuit proceedings, including the FBI and other agencies.

I will have more extensive comments on the impeachment proceedings which I will insert in the record.

Mr. President, I ask unanimous consent the full text of my statement appear in the Record at this point followed by an appendix which is referred to in the body of the statement.

There being no objection, the material was ordered to be printed in the Record, as follows:

STATEMENT OF SENATOR ARLEN SPECTER ON THE ARTICLES OF IMPEACHMENT AGAINST JUDGE ALCEE L. HASTINGS, OCTOBER 19, 1989

INTRODUCTION

Mr. Specter. The Impeachment Trial of Federal Judge Alcee Hastings represents a landmark in our constitutional history. In the 202 years since the adoption of the Constitution, this is the first time that any Federal official has been impeached after being tried and acquitted by a jury. In essence, the House's 1988 impeachment of Judge Hastings asks the Senate in 1989—eight years after the events in question, and six years after the jury verdict—to reconsider a jury decision on charges and evidence that, if not identical to those before the jury, certainly are substantially the same. The case thus presents the Senate with unsettled issues touching on the applicability in an impeachment trial of legal concepts such as double jeopardy, collateral estoppel and undue delay.

Moreover, these issues arise here in the *Hastings* case in the context of a factually complicated matter. The 17 impeachment articles encompass events that center on Judge Hastings' handling of a criminal trial in 1981; his testimony at his own criminal trial in 1983; and his actions as supervising judge over an FBI wiretap in 1985. To consider fairly all these issues, the Impeachment Trial Committee in the *Hastings* impeachment heard 18 full days of testimony between July 10 and August 3, 1989. It heard 54 live witnesses (including one, William Borders, who was jailed for his refusal to testify), and two videotaped depositions; it had its record supplemented with the testimony of 25 additional witnesses from prior proceedings, including the criminal trials of Judge Hastings and William Borders. The committee received 365 exhibits and 155 stipulations of uncontested facts into its record. Its full printed record is over 6,000 pages. The very factual complexity of the matter makes the decision that each Senator must make about the appropriate standard of proof a critical issue.

In my view, the factual and legal complexities of the matter render it a case where a just decision can be made only after extensive study and reflection. After having served as vice chairman of the Impeachment Trial Committee, having had the opportunity to discuss the evidence and legal issues with my colleagues on the committee, having reviewed the briefs and considered the arguments of the parties, and with the benefit of time for my own reflection on the issues, I have decided to announce my decision on the matter of Judge Hastings' impeachment at this time with the hope that by doing so now and in this way I may assist my Senate colleagues in the difficult task of judging this historic matter. This statement sets forth my thinking and analysis of the evidence and issues raised by this case. Recognizing that this is a matter in which significant evidence and substantial arguments may be marshalled on both sides, I have attempted to discuss the case in its entirety, with recognition of the strengths and weaknesses of both sides.

BACKGROUND

The Constitution delegates the trial of impeached Federal officials exclusively to the Senate. The impeachment of a Federal judge involves an especially significant aspect of this fundamental Constitutional duty because of the importance that our Founders recognized, and our history has confirmed, of an independent Federal judiciary. It is essential that Federal judges be preserved in office, possessed of freedom to exercise independent judgment without fear of the momentary passions or possible partisanship of either the Executive or the Legislature. But it is equally important, because of the inevitable potential for corruption in those who hold office permanently, that there be a fair and just mechanism to remove judges from office if they become corrupt.

As I have said, this case represents a unique moment in our constitutional history because it is the only occasion when impeachment proceedings were brought against an individual who had been tried by a jury and acquitted. The implications of that fact are a matter for very serious consideration by the Senate. In terms of the public perception of this proceeding, perhaps the most frequently asked question is how can it be fair to try impeachment articles against someone who has already been acquitted by a jury? In that regard, the full Senate last March considered Judge Hastings' contention that the impeachment proceedings should not go forward because they were barred by the constitutional prohibition against double jeopardy. The matter was argued to the full Senate by both Judge Hastings personally and his counsel, and by all six managers from the House. After deliberation in closed session, the Senate voted 92-1 to deny Judge Hastings' motion to dismiss. At that time, although I voted with the majority, I expressed the opinion that while double jeopardy should not be an absolute bar to impeachment, nonetheless as a matter of fundamental fairness Judge Hastings' prior acquittal might well be entitled to substantial consideration after the evidence had been heard.

After a fifty-year void, from 1936 to 1986, the Senate has in the last three years been required to try the impeachments of three Federal judges: Judge Harry Claiborne of Nevada in 1986, and Judges Alcee Hastings and Walter Nixon in this session. Each of these cases has involved a judge subject to impeachment on the basis of matters previously considered by a criminal trial jury. I also note as a matter of interest that there is pending in California another criminal indictment directed against a Federal judge, Robert Aguilar. This apparently increased demand on our obligations as senators, posed by the expansion of the Federal judiciary and the modern willingness to use sophisticated investigative techniques to ferret out judicial corruption, seems to augur that considering impeachments of Federal judges may become a more frequent part of our duty. That prospect has led some of my colleagues to urge consideration of a constitutional amendment to remove that obligation from this body. I myself had leaned in that direction, but my experience as a member of the Hastings Impeachment Trial Committee has convinced me that such an amendment would be an error, both because of the importance of the impeachment task itself, and because of the knowledge we acquire in hearing impeachment trials that relates to important aspects of our oversight responsibilities. My observations on this point will be set forth at more length in an Appendix to this statement.

Each of the recent impeachment cases at some level has forced us to consider the interrelationship between criminal proceedings and impeachment. In the *Claiborne* impeachment, for example, one of the impeachment articles called for Judge Claiborne's impeachment solely by virtue of the fact of his criminal conviction, without an independent judgment by the Senate of guilt or innocence. That article was rejected by the Senate on a vote of 46 guilty; 17 not guilty; 35 present and 2 not voting. (Since a conviction requires the affirmative vote of two-thirds of the senators voting, a vote of "present" is equivalent in effect to a vote of not guilty.)

Thus, in both the *Claiborne* and *Hastings* impeachments, the Senate has expressed the clear view that it will not be bound in impeachment matters by the determinations of the judicial branch. But that is not necessarily the end point of the inquiry here: the novel issue that remains is whether principles of double jeopardy, collateral estoppel, due process or fundamental fairness require that the jury's verdict acquitting Judge Hastings, even if not preclusive of impeachment, nonetheless be given weight or deference. At the same time we should also be mindful that the Judicial Council of the Eleventh Circuit conducted an extensive inquiry, resulting in a 4909-page record, and urged impeachment. Beyond that, the House of Representatives impeached Judge Hastings on 17 Articles by a vote of 413-3.

COMMITTEE PROCEEDINGS

Before turning to a discussion of the evidence and legal principles, I note that the Impeachment Trial Committee has taken its assignment on this matter with a seriousness appropriate to the gravity of the constitutional task before it. Even before the hearings commenced in early July, a number of significant issues required decision. The committee considered and established procedures to assure evidentiary hearings that would center on important issues on genuine dispute; it guided the parties through a stipulation process and urged their reliance on testimony from prior proceedings where the issues were either marginal or not really in dispute, so that the committee was able to focus its attention on the heart of the controversy.

After extensive consideration, the committee also decided to grant Judge Hastings' request for pre-hearing discovery. It authorized three depositions on his behalf over which I as vice chairman presided, and one such examination by the House, which did not occur. Although no precedent existed for these examinations, this authorization reflected the committee's determination that Judge Hastings—and, for that matter, the House—be given ample opportunity to develop all evidence necessary to the case. In that vein, the committee also directed its staff to work with the Department of Justice and the FBI to assure that no documents in the files of those agencies material to the case were withheld.

My distinguished colleague, Senator Jeff Bingaman of New Mexico, chaired the proceedings with care, courtesy, and deliberateness. There were significant differences of opinions among the 12 Senators at various stages, and the chairman showed patience and consideration in hearing out all points of view before calling for committee decisions.

The attendance at the hearings was excellent. On only one occasion, the morning of July 20th, did we have serious trouble in securing a quorum. On that occasion, Senator Leahy, a member of this committee who also chairs the Agriculture Committee, recessed an important markup so that senators who were on both the Hastings Committee and the Agriculture Committee could return to establish a quorum. All or almost all of the 12 committee members were in attendance at most sessions.

After the completion of prehearing procedures, on July 10, 1989 our committee commenced hearing evidence. We received evidence over approximately 120 hours of hearings in the course of 18 hearing days, concluded our proceedings shortly after 10:00 p.m. on August 3. The evidentiary hearings generally ran from 9:00 a.m. to 5:30 p.m. We decided to devote these substantial blocks of time in order to avoid having the case presented in a disjointed or fragmented manner. While the proceedings were interrupted occasionally by votes in the House and Senate, that disruption was held to a minimum because the Senate leadership delayed votes on many days until 5:30 p.m. and because the House members when possible agreed to the continuation of the hearings in their absence with their counsel handling the proceedings.

SUMMARY OF THE ARTICLES

There were 17 articles of impeachment which we considered. Briefly summarized, the articles charged:

That in 1981 Judge Hastings conspired with William Borders, a Washington, D.C. attorney, to solicit a $150,000 bribe from two defendants who were being tried before Judge Hastings on racketeering charges (Article I);

That in his 1983 trial on the bribery conspiracy, Judge Hastings lied repeatedly in securing his acquittal (Articles II–XV);

That is 1985 Judge Hastings revealed secret material to a Miami politician that Judge Hastings had learned in his capacity as supervising judge over an FBI wiretap (Article XVI); and

That by virtue of all of the foregoing, Judge Hastings undermined confidence in the integrity of the judiciary. (Article XVII).

I will now discuss briefly the evidence on these articles. Inasmuch as the wiretap disclosure charge, article XVI, is the simplest and most easily decided, I will discuss it first.

EVIDENCE ON THE WIRETAP DISCLOSURE ARTICLE

Article XVI charged Judge Hastings with ruining an FBI undercover investigation by revealing to one of the subjects, Dade County Mayor Steven Clark, confidential information that Judge Hastings had learned in his capacity as supervising judge of the wiretap. The evidence on this charge was weak, and the charge itself insubstantial. Although Mayor Clark testified that it was Judge Hastings who revealed the wiretap information to him, Mayor Clark's testimony as to where and how this took place was contradicted by a host of witnesses; by photographic evidence; and by the very contents of one of the FBI wiretaps. Judge Hastings also presented evidence that, if not fully persuasive, suggested an at least equally plausible explanation of how the wiretap information might have come to Mayor Clark's attention. I had no trouble reaching the conclusion that the House had not proven its case on this article.

In that context, I note that my colleague, Senator Gorton, observed after the House had completed its presentation on article XVI that he hoped Judge Hastings would not waste the committee's time is even bothering to reply to this article:

"If we had greater jurisdiction, I'd have moved to dismiss at the end of the House case. . . . At this point, I can say to the respondent, the only thing they can possibly do by beating this dead horse is cause me to change my mind, which I'm sure that they do not wish to do."

Although Senator Gorton's comment may perhaps have referred as much to his view that article XVI did not present a legally sufficient basis for impeachment, I believe it was the prevailing view among members of the committee that the nature of the charge under this article and the nature of the evidence to support it would not warrant Judge Hastings' removal from office. Evidence presented to the committee showed that when this matter arose in 1985, the Justice Department did not consider it an appropriate matter for prosecution; and in my view that correct determination leads to the similar conclusion that his article and the evidence in support of it are not an appropriate basis for impeachment.

EVIDENCE ON THE BRIBERY/CONSPIRACY AND PERJURY ARTICLES

As I have said, the central article in the case involves charges of conspiracy to solicit a bribe and perjury. Judge Hastings was charged with agreeing with a Washington attorney, William Borders, to fix a racketeering case involving two brothers, Tom and Frank Romano, who were to be sentenced by Judge Hastings. In the House's view, soon after the *Romano* case was assigned to Judge Hastings, he in conjunction with Borders began attempting to solicit a bribe from the Romanos. As the House argued, Judge Hastings in May of 1981 continued the Romanos' sentencing solely for the purpose of demonstrating to them the necessity of paying him a bribe; in July of 1981 Judge Hastings sentenced the Romanos, who were elderly, in bad health and had no criminal history, to substantial jail terms in order to coerce them to participate in a bribe; as a further coercion, Judge Hastings throughout the summer of 1981 refused to follow binding precedents of the U.S. Court of Appeals for the Fifth Circuit that would have required him to return over $800,000 of forfeited property to the Romanos. In the House's view, only after Judge Hastings believed that the Romanos were prepared to pay a $150,000 bribe, and after the first $25,000 of that bribe was paid to Borders, did Judge Hastings finally issue the order returning the Romanos' property that the law required.

Judge Hastings denied all of this categorically, as he did in his 1983 trial. He claimed that Borders' efforts were not part of any conspiracy with him, but rather were part of a "scam" run by Borders and others to obtain payments based on a claimed but totally false ability to exercise influence over Judge Hastings. This defense was presented by Judge Hastings to the 1983 trial jury which acquitted him.

In the House's view, as alleged in articles II–XV, that acquittal was tainted because it was based on perjured testimony and fabricated evidence. For this part, Judge Hastings urges that those same arguments that his testimony was false and his evidence fabricated were presented to, and rejected by, the 1983 trial jury.

THE HOUSE CASE AGAINST JUDGE HASTINGS

The evidence presented by the House against Judge Hastings was circumstantial in the sense that there was no "smoking gun": that is, no admission of guilt by Judge Hastings, and no witness who directly testified that he had paid money to Judge Hastings or saw or heard Judge Hastings agree to accept a bribe or participate in a scheme with Borders. The fact that the case was entirely circumstantial, however, does not necessarily mean that it was weak or insubstantial. The law has consistently recognized that circumstantial evidence—meaning evidence that involves facts from which inferences are drawn rather than direct observation of the fact at issue—may be as good or better than direct evidence; indeed it is possible to convict someone of first-degree murder based entirely on circumstantial evidence.

However, what the fact that the case against Judge Hastings is entirely circumstantial does mean is that a meticulous scrutiny of the record is required. We must be sure that the facts which comprise the circumstantial case have been established; that the inferences which the House seeks to have drawn from those facts are appropriate; that there are no other equally appropriate inferences consistent with innocence to be drawn from those same facts; and that the chain of circumstantial evidence presented is in its entirety sufficient to lead to a conclusion of guilt.

The full body of the circumstantial evidence against Judge Hastings is set forth in the report of the Impeachment Trial Committee, which all members have. I believe that the very difficult presentation of this mass of evidence was well handled by the House managers. Their case was meticulously presented at the hearings by Representatives John Bryant, Hamilton Fish, George Gekas, John Conyers, and Mike Synar and neatly summarized on large charts which permitted the entire pattern of circumstantial evidence against Judge Hastings to be grasped and understood. The circumstantial evidence presented by the House raised inferences suggestive of guilt. That evidence included:

A pattern of repeated telephone contacts between Judge Hastings and William Borders, including a pay phone to pay phone telephone call on April 9, 1981, which tie in closely either to key events in the *Romano* case or to contacts between Borders and the government's informant, William Dredge;

Judge Hastings' appearance for dinner at the Fontainebleau Hotel in Miami on September 16, 1981, as Borders had predicted he would, to give proof of his participation in the bribery arrangement;

Borders' apparent possession of inside information about the *Romano* case with no conclusive source other than Judge Hastings;

Judge Hastings' hurried issuance of an order returning the Romanos' property on October 5 and 6, 1981, after Borders had received the $25,000 downpayment on the bribe on September 19, 1981;

A suspicious telephone conversation between Borders and Judge Hastings on October 5, 1981 (tape recorded by the FBI) which the House contends was a coded discussion of the status of the bribery arrangements; and

Judge Hastings' abrupt departure from Washington on October 9, 1981 after learning of Borders' arrest and the FBI's desire to speak with him concerning a "bribery in his courtroom."

The recorded October 5 telephone conversation is particularly worthy of discussion. On its face it is literally a conversation about "letters for Hemp": that is, letters which Judge Hastings claims that he had prepared on October 5, 1981 in support of Hemphill Pride, a mutual friend of Judge Hastings and William Borders. The draft "Hemp letters" which Judge Hastings claimed he wrote on October 5, 1981 were introduced in evidence in both the 1983 trial and here.

More of the committee's attention was focused on the October 5 phone call and the "letters for Hemp" than any other aspect of the case. In the House's view, that phone call could not really have been about help for Hemphill Pride, and those letters could not have been written on October 5, for a variety of reasons. The House argued that the literal text of the telephone call seems to make no sense because Judge Hastings is apparently calling Borders for information yet receives none. The claim that the telephone call was part of a program of support for Hemphill Pride is in the House's view totally disproven by Pride's testimony that he was not aware of, and did not wish any such efforts by Judge Hastings and Borders, and by the lack of any extrinsic evidence to show that Judge Hastings in 1981 had done anything to be helpful to Pride.

In addition, there was evidence directed to establishing that the draft "Hemp letters" were not prepared on October 5, as Judge Hastings claimed, but rather much later. Those letters are at least suspect since they contained not a single edit or correction despite Judge Hastings' testimony that he wrote them while sitting on the bench presiding over a jury trial. Further, there is some reason to question whether the letters were shown to anyone else by Judge Hastings before December, 1982, when they were turned over to the Federal prosecutors in pretrial discovery. In the House's view, if those letters were genuine, they should have been produced to prosecutors when Judge Hastings turned over other documentary evidence in February, 1982; and the House further contends that, if they existed, Judge Hastings should have made them available as a matter of defense for Mr. Borders in his March, 1982 trial. It is a stipulated matter that Joel Hirschhorn, for a time Judge Hastings' principal defense counsel, never saw the letters.

In all, the House urges that the evidence establishes that the October 5 phone call between Borders and Judge Hastings could not have been about help or letters for Hemphill Pride because no help was being offered and no letters had been drafted. Instead, the House urges, the October 5 phone call was a coded confirmation from Borders to Judge Hastings that the bribery arrangement was still on, that the $25,000 downpayment had been received and that the $125,000 balance was to be expected shortly. Thus, in the House's view, when Judge Hastings in that October 5 conversation told Borders that "I'll send the stuff off to Columbia in the morning," what he was really saying was that the *Romano* forfeiture order would go out the next day. That theory, the House urges, is dramatically confirmed by Judge Hastings' October 5 direction to his law clerk, Jeffrey Miller, to finish the *Romano* order "that day"; and by the fact that the order was then mailed out the next day special delivery.

SOME GAPS IN THE CIRCUMSTANTIAL EVIDENCE

The chain of circumstances and inferences that the House presented against Judge Hastings was not, however, without gaps—some of them quite significant. For example, in the House's view, the first demonstration of Judge Hastings' participation in the bribery arrangement was to be the fact that he would continue the *Romano* sentencing from May 11 without being asked to do so by either party. Yet the transcript of the May 11 proceeding shows that when Judge Hastings took the bench, he stated immediately that he was prepared to proceed with the sentencing and continued the matter only after being requested to do so by the Romanos' defense lawyer. Although the House urges that Judge Hastings must somehow have been advised that the defense lawyer was going to move for a continuance, there was no evidence to sustain that position.

I note also that in Judge Hastings' view, as argued by his counsel, the prediction that the sentencing would be put off actually referred to the July sentencing date rather than the May date. Judge Hastings pointed to the very limited evidence of documented phone contacts between Borders and Dredge before May, 1981 as evidence that their dealings regarding the Romano bribe could not have begun in earnest until after the May 11 sentencing date. Thus, Judge Hastings' imposition of sentence on the Romanos on July 8 without a continuance may itself be a substantial refutation of one of the elements of the circumstantial case against him.

Another gap in the circumstantial evidence has to do with the failure to trace any of the bribe payments to Judge Hastings. Twenty-five thousand dollars was paid by an undercover agent to Borders on September 19; the FBI could find no evidence that any of that money went to Judge Hastings and, indeed, conceded that an examination of his personal circumstances and lifestyle were consistent with what one would expect of an individual living on the salary of a Federal judge. In this regard I note that Judge Hastings has vigorously assailed the FBI's decision to arrest Borders with the $125,000 balance of the bribe on October 9, 1981 rather than "let the money walk." Had Borders been permitted to leave with the money, Judge Hastings argues, that would have been a conclusive demonstration of his innocence since none of the money would have gone to him. Judge Hastings offered testimony supporting his view that the investigation was flawed in this way from both the U.S. Attorney and the Chief of the Criminal Division for the Southern District of Florida. However, there was important testimony from other witnesses with significant law enforcement experience that supported the decision to arrest Borders at the scene of the payoff, on the grounds that there would be no way to trace either the money or Borders once he left. Consequently, I do not weigh this factor heavily because of the arguable reasonableness of the FBI action.

Another question left open by the circumstantial evidence proffered by the House has to do with the timing and substance of the telephone conversations intercepted by the FBI on October 5, 1981. As I have noted, in the House's view the call between Borders and Judge Hastings at 5:12 p.m. was the occasion when Judge Hastings in a coded fashion communicated to Borders that the *Romano* forfeiture order would go out the next day. Yet at 4:22 that afternoon, there was also an intercepted telephone conversation between Borders and the FBI undercover agent, Paul Rico. In that conversation, some 50 minutes before the Borders/Hastings conversation, Borders told Rico that the *Romano* forfeiture issue had been taken care of and that the order would go out the next day. This is significant evidence supporting the view that Borders knew the status of the *Romano* order well before the conversation with Judge Hastings at 5:12 p.m., and thus that Borders had another source of inside information about the *Romano* case. If that is the case, then of course the 5:12 p.m., conversation had nothing to do with the *Romano* case or a bribe but instead was exactly as it appeared—a discussion of help for Hemphill Pride.

Probably the most significant gap in the House's circumstantial case was the timing of the *Romano* forfeiture remittance order. Pursuant to the arrangement between Mr. Borders and the undercover agent, Judge Hastings was supposed to issue an order remitting a sizable portion of the forfeiture within ten days of the $25,000 payment of September 19. That is, it was to be issued by September 29. There is no question about the September 29 date, because these arrangements were made between Borders and Rico on September 19 in a conversation that Rico was tape recording for the FBI. Such an order was issued, but it was issued 17 days later on October 6. There is absolutely no evidence as to why, if Judge Hastings were acting in collusion with Mr. Borders in the scheme as represented by Borders, the order was not issued by the promised date. As to the substance of the remittance order, there was strong reason for Borders to have concluded—as did the Romanos' attorney, Neal Sonnett—that such a remittance would ultimately be ordered no matter what because existing opinions of the Court of Appeals for the Fifth Circuit virtually mandated that result.

JUDGE HASTINGS' TESTIMONY

In the context of this case—where the prosecution's circumstantial evidence raised inferences of guilt, but where those inferences were at least in part offset by gaps in the circumstantial evidence—clearly the most important witness was the Respondent, Judge Hastings. This is particularly true in the absence of testimony from William Borders. Judge Hastings testified, indeed one could almost say exhaustively, before the committee. He testified on direct examination for a day and one-half; on cross-examination for approximately three hours; and responded to questioning from members of the committee for more than one full day. In his testimony he avoided no issues and offered explanations for all of the circumstantial evidence of guilt directed against him.

Judge Hastings explained his presence at the Fontainebleau Hotel by stating that Mr. Borders had told him he expected to be there on that evening. Judge Hastings gave testimony, which was corroborated by others, including even Mr. Dredge, that Mr. Borders was a cryptic and mysterious individual who sometimes did not show up as expected, and whose speech often contained more confusion than clarity.

The incriminating implications of the taped conversation of October 5, 1981, were undercut to some extent by Judge Hastings' testimony that he and Mr. Borders knew each other so well, and were talking on a subject so familiar to them, that they could communicate in an unusual, clipped manner. The comments of my colleague, Senator Durenberger, bore on this issue when he noted that it was difficult for him (Senator Durenberger) to put himself in the shoes of Judge Hastings, because the differences in their backgrounds may have limited his understanding of the nuances in Judge Hastings' actions:

> . . . [I]t's largely because of a conversation that you had with Senator Specter a little while ago, in which you, I imagine, appropriately said something to him about the fact that it wasn't really fair for him to try to judge some particular behavior of yours on the basis of the way he might behave or the world that he might have observed. And I think as I have observed the difficulty expressed here in the ques-

tions on all of these issues around this table, the difficulty that people are going to have on this committee, to say nothing of the people who are not on this committee, is going to be whether or not and how far they are going to walk in your shoes versus walking in their own when they go through this kind of material.

Judge Hastings also responded to the prosecution's evidence concerning his claimed delay in the production of the "Hemp letters." He testified that he had made them available as early as March, 1982 to John Shorter, William Borders' trial attorney, and pointed out in confirmation of that fact in Shorter's testimony before the Eleventh Circuit Investigating Committee.

Judge Hastings explained the timing of the issuance of the *Romano* forfeiture order by the fact that the law clerk familiar with the case, Jeffrey Miller, was due to leave his chambers at the end of October, and Judge Hastings wanted to be sure that the *Romano* order would be completed before Miller's tenure ended. Judge Hastings' position was supported by Miller's own testimony that in early September, 1981—and therefore before the September 19th $25,000 downpayment from the undercover agent to Borders—Judge Hastings had told Miller "not to agonize about it" and just to give the Romanos their property back. Miller was able to date this conversation with some specificity by reference to a Fifth Circuit decision handed down on August 27, 1981 which he brought to Judge Hastings' attention. In Miller's view, had he been more prompt in carrying out his own responsibilities, the timing would not have created any cause for suspicion against Judge Hastings.

Judge Hastings also explained his precipitous departure from Washington on October 9, 1981 by noting that perhaps his experience with the FBI might not have been the same as that of persons from different backgrounds. Judge Hastings contended that he did not "flee" on October 9 but, as the FBI conceded, went to a place where the FBI would have expected him to be. He went to his girlfriend's home; when the FBI arrived, he invited them in and courteously answered all of their questions.

My own observations on Judge Hastings' testimony were that he carried himself with confidence and is obviously a highly intelligent man. Judge Hastings was impressive and personable. His able counsel, Professor Terrence Anderson, commented in his closing speech that Judge Hastings was "touched with greatness."

Those attributes notwithstanding, I was troubled by Judge Hastings' testimony. There was a disturbing quality to some of what Judge Hastings said in that he seemed more inclined to offer profuse details about matters that were not truly of interest than to respond to very specific questions on particularly relevant points. Perhaps my own "feel" for his testimony has to be qualified in recognition of the eight-year lapse between the events and the Senate hearings, and the circumstances of the relay questioning by senators. After Judge Hastings' direct testimony, he was questioned by counsel for the House of Representatives, and then by the 12 committee members in several rounds of 10 minutes each. It may be that no witness has been subjected to such extensive examination by so many questioners in any previous impeachment proceeding. Most of the questioners were experienced lawyers with prosecutorial backgrounds. The questioning of committee members was incisive in pressing Judge Hastings on the key points of his defense.

That questioning was thorough, perhaps even tough, but nonetheless fair. I firmly believe that the forceful questioning of Judge Hastings aided our inquiry by bringing his positions, and his explanations of the chain of circumstantial evidence against him, into sharp focus. Judge Hastings was fully capable of dealing on even terms with all the questioners, and, at the conclusion of the proceedings, said he had been equitably treated:

> Senator DURENBERGER. . . . As you sit here this morning, whether you slept well or not, what are your feelings about the general fairness of the process of the last three-and-a-half weeks, particularly as you reflect on the people on this side of the table?
>
> Judge HASTINGS. I feel very good about it, Senator, and it gives me an opportunity to thank you all for your attention. I think through my lawyers and myself I expressed my feelings with reference to the impeachment process, and I think we have reached another plateau that I did not think that we would reach. And I still think it's a mistake to have reached this plateau, but not as it pertains to the members of this committee. You are doing what I believe you believe is the proper thing."
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> Senator PRYOR. . . . I think this proceeding has been extremely fair. And I hope and we hope that you feel it has been fair.
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> Judge HASTINGS. I do, Senator Pryor.
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> * * * * * * *
>
> Judge HASTINGS. Mr. Chairman, just one thing. I thank you especially and Vice Chairman Specter and each Senator for all of your courtesy. I really do appreciate it.
>
> Earlier on one of the Senators asked me about the process. I have immense respect for the process, and I would—and I don't mean it facetiously—urge upon you that what we have had, regardless of outcome, is a very good impeachment inquiry.

One particular matter in Judge Hastings' testimony which troubled me was the Judge's attitude toward Mr. Borders. Throughout the proceeding, Judge Hastings displayed fiery emotion at many stages, including his denunciation of the FBI, his anger at the Chief Judge of the Eleventh Circuit and his resentment about bearing the burden of testifying on so many stale transactions. Yet at no time did he seem to display emotion or hostility against Mr. Borders who, according to Judge Hastings, betrayed his friendship, subjected him to public humiliation and robbed him of his good name. I asked Judge Hastings why, in the face of his numerous passionate denunciations of many others, he had never complained about Mr. Borders' conduct. Judge Hastings responded matter of factly:

> I resent him, Senator, and that's because no one has asked me the way that you have. Alan just asked me a minute ago about it, and I told him he stole my name. There's nothing for me to do about getting bitter with anybody. The object I have is to try to get better. But if you put the question to me directly and as you are putting it, please know that I resent it highly, what has transpired here insofar as anything that he did.

After that unemotional and bloodless reply, I asked the judge:

> Judge Hastings, you've expressed yourself about other people. You called his mother, and I can understand his mother is not him. But even in the manner of expressing it as you just did, there isn't the passion in your voice, there isn't the strength, there isn't the outrage. I mean, after all, by your approach to this case, here's a longstanding friend, a trusted friend who has used you to secure $25,000 in cash and to have his hands on another $125,000 in cash, on the representation that he can fix you, based upon a lot of association which a lot of people knew about, a trusted friend betrayed you, subjects you to a criminal prosecution to the Investigat-

ing Committee of the Eleventh Circuit, to an impeachment proceeding—where's your real resentment about this man?

And he replied:

> I just expressed it to you and I'm sorry Senator, if the fire in my belly is not commensurate with your attitude with reference to what it ought be [sic]. Please know this, that I've testified in two proceedings and I don't believe that anybody until you has asked me that question that way, and I just answered you as best I could. But please, sir, know that I don't like what happened to me. Having to go through this orderal has been awesome, and I consider that Bill Borders is responsible for that and I don't know what else you would have me say. I'm not the kind of person who would kill somebody, but if I were I would have that kind of attitude.

The videotape, even better than the printed record, illustrates my concern. Perhaps Judge Hastings' attitude toward Mr. Borders is explained by the saying that he responded more in sorrow than in anger.

I was also not totally satisfied by Judge Hastings' explanation on the controversial "Hemp" letters. It seemed to me that, regardless of Judge Hastings' attitude toward Borders, Judge Hastings would have seen to it that those letters were available for use in Borders' defense. The prosecutor at Borders' trial emphasized the absence of those letters in his closing argument. Had Mr. Borders been acquitted, that certainly would have been of considerable tactical advantage to Judge Hastings.

In all, I had four turns of 10 minutes each to question Judge Hastings about the bribery, conspiracy and perjury aspects of the case. In addition to my concern over his lack of apparent animus toward Mr. Borders, my questioning focused on the peculiar circumstantial timing of the contacts between Judge Hastings and Mr. Borders which was frequently coincidental with key developments in the *Romano* case; the troubling evidence regarding the so-called "Hemp letters," including the pristine condition of the drafts and the belatedness with which they were made available to the prosecution; and the peculiarities of the October 5 phone call, in which, although Judge Hastings apparently called Mr. Borders seeking information, it seems as though no information was passed on by Mr. Borders to Judge Hastings.

Judge Hastings responded to all my questioning. He vigorously asserted that the "Hemp letters" were drafted on the bench as he had testified, and said that he was blessed with the facility to prepare drafts without interlineations or editing, that the drafts were not produced to the prosecution in his case until December 1982 because of tactical battles over the timing of discovery, that in any event he expected the letters to be subjected to careful scientific analysis which could fix the date of their preparation, and that the language of the October 5 phone call could be explained because he and Mr. Borders knew each other well and were conversing on a subject that was quite familiar to both of them. Those explanations, if not wholly convincing, were at least credible.

THE ABSENCE OF WILLIAM BORDERS AS A WITNESS

No discussion of the evidence in this case would be complete without reference to the lack of testimony from William Borders. As is obvious, only William Borders and Judge Hastings know for an absolute certainty whether they had an agreement to solicit a bribe from the Romanos. I believe our record suffers significantly from the absence of Mr. Borders' testimony.

It became apparent early in the committee's proceedings that neither party intended to call Mr. Borders as a witness. I was not fully satisfied with the explanations for this decision given either by Judge Hastings or the House. In essence both sides seemed unwilling to vouch for Mr. Borders' credibility or to have his testimony associated with their case. While this attitude is understandable as a matter of trial tactics, I am not sure that it is wholly appropriate for the House of Representatives, which has responsibilities not only as the prosecuting party in this impeachment, but also as a public body of the United States with an obligation to see that justice is done. The House of Representatives serves a dual function in impeachment proceedings. It first considers whether the circumstances warrant impeachment; once impeachment articles are voted, it has the responsibility for their presentation to the Senate. As such, the House may be seen as operating in a quasi-judicial capacity in which its obligations as "prosecutor" in the Senate are coordinate with its obligations as a legislative and (in impeachment matters) adjudicative body to develop a full and complete factual record.

It is arguable whether Mr. Borders would have testified under any set of circumstances, but certainly given the relatively short time period between his appearance before the committee and the conclusion of the impeachment inquiry, the civil contempt sanctions facing Mr. Borders for his refusal to testify here seem to be inadequate. Had the House been more aggressive in seeking Mr. Borders' testimony during the investigative phases of its own impeachment inquiry, when it clearly had a duty to develop all evidence and not just evidence that might help convict Judge Hastings—and when (even though it lacks the power of the Senate to invoke civil contempt proceedings) it had available to it the threat of criminal prosecution for contempt of Congress if Mr. Borders refused to testify—it is possible that we might now find ourselves in a position to have the benefit of Mr. Borders' testimony in resolving the question of Judge Hastings' guilt or innocence.

The issue of having the Senate committee call Mr. Borders as its own witness was raised early in our proceedings and was rejected. The committee continued to be divided on the subject, but finally decided on July 19 to subpoena Mr. Borders. In anticipation of the possibility of Mr. Borders' testimony, the committee had on June 27 obtained an immunity order for his testimony. On July 24, and again on July 27, Mr. Borders appeared before the committee and, notwithstanding the immunity grant, refused to answer any questions. On both occasions, the committee considered and rejected Mr. Borders' objections to giving testimony; when he persisted in his refusal, the committee directed Senate Legal Counsel to initiate proceedings to compel Mr. Borders' testimony. A full Senate resolution was adopted unanimously on August 3. On August 17, the United States District Court for the District of Columbia (per Judge Revercomb) issued an order directing Mr. Borders to answer all questions put to him by the committee and the parties, or else to appear in court "forthwith" and show cause why he should not be held in contempt. Mr. Borders appeared before a session of the committee over which I presided on August 22 and persisted in his refusal to answer questions notwithstanding my advice that his refusal would subject him to sanctions for civil contempt, and could thereafter result in his prosecution for criminal contempt. Mr. Borders was in fact held in civil contempt on the afternoon of August 22 (per Judge Jackson). Citing personal reasons, he asked for and was given the committee's agreement to defer commencement of his imprisonment until August 25. He has been continuously incarcerated since that date.

The question of how to factor the absence of Mr. Borders' testimony into the evidence in this case is a difficult one. My colleague, Senator Gorton, asked Judge Hastings whether we should not infer from Borders' refusal to testify—in Borders' words at one point to be a part of the "prosecution" of Judge Hastings—that Borders' reluctance to come forward was motivated by a desire to protect Judge Hastings. Judge Hastings of course denied this. Certainly applying generally accepted principles of law, one could hardly say that Judge Hastings in any way possessed an element of control over Mr. Borders sufficient to permit any adverse inference against Judge Hastings from Borders' failure to give testimony.

My own inclinations tend more toward the opposite point of view. As I have said, I believe the House's obligations here are quasi-judicial, and involve a public responsibility to develop a complete record. The House, I believe, had as much interest, and as much duty to secure Mr. Borders' testimony as did the Senate. The House, no less than the Senate, is fundamental in the constitutional process of impeachment, and must perform its role in recognition of the gravity of that task. Even in a criminal trial, the law recognizes that the prosecution is not just an advocate for conviction but also for justice. It is often said that the government wins its case whenever justice is done. In that context, it perhaps may be that the lack of vigor with which the House pursued Mr. Borders' testimony during the investigative phase of its proceedings is a factor worthy of some consideration here. Certainly it is the House which has the burden of proof, and to the extent that there are gaps in the circumstantial evidence where Mr. Borders' testimony, whether believed or not, could have helped fill the voids, the consequence of those gaps should perhaps fall on the House as the party which has the burden of proof.

As other members of the committee are aware, my view throughout these proceedings has been that Mr. Borders was an indispensable witness. I urged the committee to call him in the face of the unwillingness of either side to do so. The matter of how to weigh the absence of his testimony is an aspect of this case on which I have given considerable reflection. In the end, I have concluded to give Mr. Borders' absence as a witness no weight in my own decision because I believe that there are plausible arguments both ways over which interpretation ought to be given to Borders' refusal to testify, but I do believe the importance of the issue makes it worthy of this rather extensive comment for whatever weight my colleagues may choose to give it in their own consideration.

COMMENTS ON THE OVERALL NATURE OF THE BRIBERY/CONSPIRACY AND PERJURY EVIDENCE

In sum, the evidence against Judge Hastings on the bribery conspiracy and perjury articles has, in my judgment, the following aspects:

No "smoking gun" or direct evidence of guilt;

A significant chain of circumstantial evidence pointing toward guilt;

A number of gaps in the chain of circumstantial evidence; and

A vigorous assertion of innocence by a respondent subjected to lengthy cross-examination and examination by committee members.

This case does not come to us on a clean slate. It comes to us after a jury trial six and one-half years ago where much the same allegations and much the same evidence were presented to a jury, and where a jury concluded under the reasonable doubt standard of proof applicable in those proceedings that Judge Hastings was not guilty.

THE DOUBLE JEOPARDY ISSUE

By a vote of 92–1, the Senate denied Judge Hastings' motion to dismiss the articles of impeachment related to the bribery charge on grounds of double jeopardy. I voted with the majority because of my view that a motion to dismiss ought to be granted at the outset of the proceeding only if there was a conclusive legal bar to going forward. I noted at that time that the Senate could guarantee fairness by reconsidering the issue at the conclusion of the proceeding.

It seemed to me inappropriate for the Senate to summarily dismiss articles of impeachment after the recommendations by the Judicial Council of the Eleventh Circuit and the Judicial Conference of the United States and the 413–3 vote to impeach in the House of Representatives. The underlying policy considerations behind double jeopardy could be best taken into account, in my opinion, in the context of the totality of the circumstances after having heard all the evidence. We would then be in a position to assess the genuineness of Judge Hastings' claims that the Senate trial of his impeachment on articles I through XV (the bribery conspiracy and perjury articles) necessarily encompassed matters embraced within the framework of his 1983 trial in a way that invoked double jeopardy protections.

We are now at such a point. The appropriate starting place for our inquiry, it seems to me, is in the historical development of the double jeopardy protection. That doctrine finds expression not in the text of the Constitution as adopted in 1787, but rather in the Fifth Amendment adopted two years later as part of the Bill of Rights.

When the Bill of Rights was considered, James Madison presented a proposed amendment to the House of Representatives on June 8, 1789 with the following text:

> No person shall be subject, *except in cases of impeachment*, to more than one punishment or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public

use, without a just compensation."—1 Annals of Congress 433 (June 8, 1789) (emphasis added). A similar provision appears in the Journal of the House of Representatives of August 1789:

> No person shall be subject, *except in case of impeachment*, to more than one trial, or one punishment for the same offense; nor shall be compelled, in any criminal case, to be witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."—2 Schwartz, *The Bill of Rights: A Documentary History* (1971) at 1122-23 (emphasis added). But in the form finally enacted, the Fifth Amendment provides:
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> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Thus, as a beginning point, the textual history of this constitutional provision suggests that "case(s) of impeachment" were not meant to be excluded from the amendment's prohibition against double jeopardy. This would logically account for deletion of the phrase "except in case of impeachment" as a specific exception to the bar on double prosecution.

But that textual construction of the Fifth Amendment is not necessarily conclusive. There is nothing in the *Annals of Congress* or the constitutional histories that sheds significant light on the Framers' intention in modifying the text of the Fifth Amendment to eliminate the referenced exception for cases of impeachment from the double jeopardy protection. It may be that its drafters considered the "except in case of impeachment" language as surplusage in light of the existing language of Article 1, Section 3, Clause 7, which provides:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment according to Law.

That language describes at least one situation in which it is clear that double jeopardy would not prevent both impeachment and criminal prosecution. The drafters may well have contemplated that impeachment proceedings would invariably occur prior to any criminal prosecution, in which case the interrelationship between double jeopardy and impeachment would be fully established by the text of Article I, sec. 3, cl. 7 allowing criminal prosecution to follow conviction in an impeachment proceeding. This is a logical interpretation in light of the fact that much of the constitutional debate surrounding the creation of an appropriate impeachment mechanism and standard ("Treason, Bribery and other high Crimes and Misdemeanors") centered on the Executive, who it has always been assumed could not be prosecuted prior to impeachment.

That, in fact, has been our historical course. Until the 1973 indictment of Court of Appeals Judge Otto Kerner, no court had ever had occasion to consider whether a sitting Federal judge was subject to criminal prosecution. This issue was then decided in *United States* v. *Isaacs,* 493 F.2d 1124, 1140-44 (7th Cir. 1974), *cert. denied* 417 U.S. 976 (1974):

> On the basis of the text of the Constitution, its background, its contemporaneous construction, and the pragmatic consequences of its provisions on impeachment, we are convinced that a federal judge is subject to indictment and trial before impeachment . . . 493 F.2d at 1144.[1]

The precedent established in the *Isaacs* case can now be seen as having paved the way for the recent impeachment cases against Judges Claiborne, Hastings and Nixon, all of whom were subject to criminal prosecution before impeachment. To be sure, Judges Claiborne and Hastings also challenged the authority of the government to prosecute a sitting Federal judge, but in both cases those challenges were rejected by the courts.[2] Accordingly, it may now be accepted as a matter of settled judicial precedent that sitting federal judges are subject to prosecution even before impeachment. But those court decisions do not establish what the relation, if any, shall be between the results of a prior criminal trial and a subsequent impeachment. The difficulties of this issue are presented most directly in a case such as this, where impeachment follows an acquittal at trial.

Thus, the *Hastings* impeachment presents a question of the application of the double jeopardy clause of the Constitution in a way likely not contemplated by the Framers, and in a situation where neither the text of the Constitution nor historical scholarship offer a clear answer. The stark issue of whether an acquittal at trial brings protection against impeachment goes to the heart of the most basic of the protections afforded by the double jeopardy clause: the right to be free from repeated prosecution on the same charge. Within this last decade, the Supreme Court has had occasion to discuss the place of double jeopardy protections in our current jurisprudence. Because of the importance of the principle involved, it is worth repeating the Court's words at some length:

> That the [Double Jeopardy] Clause is important and vital in this day is demonstrated by the host of recent cases. That its application has not proved to be facile or routine is demonstrated by acknowledged changes in direction or in emphasis . . .
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> * * * * * * *
>
> [T]he following general principles emerge from the Court's double jeopardy decisions and may be regarded as essentially settled: The general design of the Double Jeopardy Clause of the Fifth Amendment is that described in *Green* v. *United States:*
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> The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.
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> * * * * * * *
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> The stated design, in terms of specific purpose, has been expressed in various ways. . . . [I]t has also been said that "central to the objective of the prohibition against successive trials' is the barrier to "affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." Implicit in this is the thought that if the Government may reprosecute, it gains an advan-

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Footnotes at end of statement.

> tage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own. . . .
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> * * * * * * *
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> An acquittal is accorded special weight. "The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal," for the "public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though "the acquittal was based upon an egregiously erroneous foundation." If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair.' The law 'attaches particular significance to an acquittal.' This is justified on the ground that, however, mistaken the acquittal may have been, there would be an unacceptably high risk that the Government, with its superior resource, would wear down a defendant, thereby "enhancing the possibility that even though innocent he may be found guilty." [W]e necessarily afforded absolute finality to the jury's *verdict* of acquittal—no matter how erroneous its decision.—*United States* v. *DiFranceso*, 449 U.S. 117, 127–30 (1980) (citations omitted; emphasis in original).

The Court's explication makes clear that in our society an individual's right to be free from successive prosecutions after once being acquitted of criminal charges outweighs any countervailing concern that the verdict may have been a mistake. This principle is a bedrock of our constitutional history, and indeed of the English common law.

But, as powerful as that principle may be, and as fundamental as those protections are, their application is not unlimited. Those protections extend ". . . to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute" *Ex Parte Lange*, 85 U.S. 163, 169 (1874); they do not, however, necessarily extend to non-criminal proceedings. Even where a non-criminal proceeding is based on the same facts as a prior criminal case, and even if it involves the imposition of monetary penalties, double jeopardy will not act as an automatic bar. *Helvering* v. *Mitchell*, 303 U.S. 391 (1938). In denying Judge Hastings' application to stay our impeachment trial on double jeopardy grounds, the United Stated District Court for the District of Columbia observed that double jeopardy would not preclude a Senate trial because "impeachment is not a criminal proceeding." *Hastings* v. *United States Senate*, 716 F.Supp. 38, 41 (D.D.C. 1989). The District Court's opinion concluded, however, by noting that "[a]t trial the Senators themselves may again weigh if they see fit Judge Hastings' claim that he has been wrongly tried because of his earlier acquittal." *Id.* Thus the question of whether and how the Constitution's ban on double jeopardy shall apply to Judge Hastings' impeachment expressly remains an issue for the Senate's consideration.

Recent judicial decisions hold that the question of the applicability of double jeopardy protections to noncriminal proceedings following an acquittal turns on the issue of whether the second action is "punitive." Thus in *One Lot Emerald Cut Stones* v. *United States*, 409 232, 235 (1972), the Supreme Court upheld a civil forfeiture following a criminal acquittal and said:

> . . . The forfeiture is not barred by the double jeopardy clause of the Fifth Amendment because it involved neither two criminal trials nor two criminal punishments . . ." And in *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 366 (1984), the court upheld the forfeiture of the defendant's firearms notwithstanding his prior acquittal on the same issues in a criminal case; the court said that in the absence of evidence that the forfeiture sanction was "punitive," or "an addition-

al sanction for the commission of a criminal act," neither the principle of "collateral estoppel nor the Double Jeopardy Clause affords a doctrinal basis for such a rule of preclusion. [3]

Thus, as a matter of constitutional and legal inquiry, the extent to which double jeopardy protections may apply in an impeachment proceeding following a criminal trial may depend on whether impeachment is viewed as an "additional sanction" for criminal conduct, and thus punitive, or simply remedial. That question, in turn, leads back into an analysis of the Constitution's text and history. Our research has disclosed no conclusive authority. But there are significant references in contemporaneous debates to suggest that the Framers may well have considered impeachment punitive, and thus within the currently understood scope of the double jeopardy protection.

In the records of the Constitutional Convention, as reported in the Journal of James Madison, a number of relevant references may be noted from the debate on the question "shall the executive be removable on impeachment?"

> Col. Mason. . . . Shall the man who has practised corruption [and] by that means procured his appointment in the first instance, be suffered to escape *punishment*, by repeating his guilt?
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> * * * * * * *
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> Doc. Franklin. . . . It would be the best way therefore to provide in the Constitution for the regular *punishment* of the Executive where his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused."
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> * * * * * * *
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> Mr. Randolph. The propriety of impeachments was a favorite principle with him. Guilt wherever found ought to be *punished*. The Executive will have great opportunities of abusing his power; particularly in time of war when the military force, and in some respects the public money will be in his hands. Should no regular *punishment* be provided it will regularly be inflicted by tumults and insurrections."
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> * * * * * * *
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> Mr. Govr. Morris. . . . The Executive ought therefore to be impeachable for treachery; Corrupting his electors, and incapacity were other causes of impeachment. For the latter, he should be *punished* not as a man but as an officer and *punished only by degradation from his office*." (Emphasis added).[4]

Additional contemporaneous suggestions that impeachment, although not necessarily criminal, was nonetheless viewed by our Framers as punitive can be found in the comments of James Madison and Elias Boudinot during the debate in the First Congress in 1789 on the establishment of executive departments and the power of removal from office.

> Mr. Boudinot. . . . When the committee come to consider the clause respecting the removal by impeachment, *they will find it is intended as a punishment for a crime* and not intended as the ordinary means of rearranging the departments."
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> * * * * * * *
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> Mr. Madison. . . . But if the President shall join in a collusion with this officer, and continue a bad man in office, *the case of impeachment will reach the culprit and drag him forth to punishment*." (Emphasis added).[5]

There is, to be sure, considerable scholarship that also suggests that impeachment should not be viewed as "punitive." A number of factors support this view, perhaps most importantly the American departure from the then-existing English practice under which an impeachment tribunal could impose criminal penalties in addition to removal from office. *See*, 1 Story, *Commentaries on the Constitution*, Section 803 at 586-7 (1905). But in my view, the early references to grounds for impeachment as a “crime” and to the impeachment process as “intended as a punishment” are of special significance because they were made at a time after the text of the Constitution had already limited the penalty on impeachment to removal from office—thus suggesting that such removal may well at that time have been viewed as a “punitive” action.

Under our constitutional system impeachment in fact has both remedial and punitive aspects: remedial in the sense of removing corrupt officials from office; and punitive in the sense that removal from office takes from the officeholder a very valuable position with substantial property interests attendant to it. It subjects the convicted officeholder to public condemnation and ignominy in a way that perhaps exceeds criminal prosecution. From the perspective of the officeholder, impeachment is unquestionably punitive; from the perspective of society, it is punitive and remedial.

The significance of the punitive aspects of the impeachment process are particularly important in light of the Supreme Court's observations this past May (subsequent to our denial of Judge Hastings' motion to dismiss) on the humane and personal aspects of the Constitution's double jeopardy protections:

> . . . But while recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, the approach is not well suited to the context of the ‘humane interests’ safeguarded by the Double Jeopardy Clause's proscription of multiple punishments. . . . This constitutional protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state.
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> In making this assessment, the labels ‘criminal’ and ‘civil’ are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. *Ibid.* The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads . . . Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.”—*U.S.* v. *Halper, supra,* 109 S.Ct. at 1901-2.

In my analysis of the relationship between double jeopardy protections and the impeachment process, which relies in significant measure on decisions of the court and the opinions of judges, I do not mean to suggest that the Senate's action in impeachment cases is in any way either subject to judicial review or bound by judicial precedents, or indeed by judicial interpretations of particular constitutional provisions. But the decisions and interpretations of the courts should be highly instructive to us. In our system of Government it has been the courts that through the years have been called upon to construe, define and apply the provisions of our Constitution and protections of our Bill of Rights. Their decisions reflect our values and our evolving notions of justice. The recent commentaries of the Supreme Court on the scope of the double jeopardy protection occur as the product of a process of reasoning, criticism and reflection about this concept spanning 200 years. Although we are a branch of Government coequal with the judiciary, and by the Constitution vested with “sole” power to try impeachments, I believe that the words and reasoning of judges who have struggled with the meaning and application of the Constitution and its provisions ought to be given great heed because that jurisprudence embodies the values of fairness and justice that ought to be the polestar of our own determinations.

As the Supreme Court noted in *Halper*, the double jeopardy clause protects "humane interests" that are "intrinsically personal." I do not believe that those interests may be shunted aside or ignored merely on the basis of a label that impeachment is a "non-criminal" proceeding. In the context of the proceedings against Judge Hastings, where it is now apparent that the evidence and charges on Articles I through XV are coextensive with matters that either were or could have been presented to the trial jury in 1983, I am not prepared to say that we now hear this case on a clean slate, or are free to decide it as we would if it had never been considered by a jury.

I continue to believe that the Senate acted wisely last March in denying Judge Hastings' motion to dismiss the impeachment articles against him outright on the basis of double jeopardy. There are enough non-criminal and non-punitive aspects to an impeachment proceeding that a prior acquittal should not be automatically preclusive of impeachment. Indeed, if the constitutional double jeopardy bar were applied rigidly, we would be precluded from impeaching not only acquitted judges but convicted judges as well. For, as applied to criminal cases, double jeopardy principles preclude not only a second trial after acquittal but also a second trial after conviction—as might occur in an effort by a prosecutor to obtain a more substantial conviction or a longer sentence. Thus if the double jeopardy bar were applied rigidly to impeachment proceedings, we would be foreclosed from impeaching even those judges convicted and sentenced—an obviously undesirable result. We might then find ourselves forced to proceed with inappropriate haste in impeachment matters to reach a judgment before a criminal trial began and double jeopardy protections applied.

But now, having heard the evidence, I believe that the principles of fairness and finality which underlie our constitutional double jeopardy protections, and the related civil law doctrines of collateral estoppel and *res judicata*, require that we recognize that when a public official comes before us impeached on the basis of charges for which a trial jury has already acquitted him, we hear such a case in a way different than we would if the individual had been convicted, or never subject to a criminal prosecution at all. Ultimately, there are aspects of impeachment that touch on "intrinsically personal humane interests," and aspects of punishment in the sanctions flowing from impeachment, to the point that a prior acquittal may not simply be ignored. We are required to act in a way that gives appropriate consideration to such a verdict, and that recognizes that the organs of the state have already failed in one attempt to prove that individual's guilt of the charges against him.

THE DELAY BETWEEN THE EVENTS AND THE IMPEACHMENT TRIAL

Before turning to a discussion of the appropriate standard of proof, one other legal aspect of the case requires comment. The articles of impeachment were returned against Judge Hastings by the House in August, 1988. Article I charges Judge Hastings with a bribery conspiracy ending in October 1981. Articles II through XV charge him with giving perjured testimony at a trial in February, 1983. Judge Hastings has argued, both prior to and during the committee proceedings, that the delay between the date of the alleged offenses and the House impeachment and Senate trial should in and of itself act as a bar to his impeachment. While I do not subscribe to that view, nonetheless certain points that Judge Hastings makes in this context are important in considering what deference should be given now, eight years after the fact, to a jury verdict rendered much closer in time to the events at issue.

As a beginning point in this analysis, I note that had a criminal indictment for the first time been returned against Judge Hastings in August 1988 on either the bribery conspiracy or perjury allegations, that indictment would have been barred by the five-year Federal statute of limitations. 18 U.S.C. Section 3282. While the criminal statute of limitations is certainly no bar to an impeachment proceeding, the policies behind such statutes have a great deal to do with our views of fairness in adjudicative proceedings. As the Supreme Court observed in *Burnett* v. *New York Central R. Co.:*

> Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared.' "—380 U.S. 424, 428 (1964) (citation omitted).

Indeed, in the criminal law context, it has been recognized that even for indictments returned within the statute of limitations period, lengthy and inappropriate delay in the institution of criminal proceedings could rise to the level of a violation of due process. Such delays, the Supreme Court has said, may require criminal charges to be dismissed where the delay "caused substantial prejudice to [a defendant's right] to a fair trial and . . . the delay was an intentional device to gain tactical advantage." *United States* v. *Marion,* 404 U.S. 307, 324 (1971). These principles were refined but reaffirmed six years later by the Supreme Court in *United States* v. *Lovasco,* 431 U.S. 783 (1977). Applying these principles, in *United States* v. *Barket,* 530 F.2d 189, 192 (8th Cir. 1976) the Court of Appeals for the Eighth Circuit noted that the circumstances of particular cases would require a "delicate judgment" over whether a delay in bringing criminal charges was sufficiently unjustified and sufficiently prejudicial that our basic notions of due process would preclude a criminal prosecution.

In this case, Judge Hastings argues that there has been substantial prejudice to his position from the length of the delay preceding his impeachment. Judge Hastings has pointed out that while telephone and travel records are available today for certain individuals and entities central to the case, they are missing for others; he urges that in those missing records would be proof that his contacts with Borders were not conspiratorial but routine, proof of a more courrupt relationship between Dredge and Borders that the remaining evidence established. Judge Hastings also has pointed out a number of individuals who may well have had significant relevant knowledge about the case who are either dead, missing or currently incompetent to testify: Tom and Frank Romano, "Brother" Moscato, Willie Dara, Santo Trafficante and Joseph Nesline are prime examples. In the situations of Tom Romano and Joseph Nesline, their present unavailability forced us to include in the committee's record hearsay declarations of their out-of-court statements as testified to by other witnesses, which would possibly have been held to be improper evidence under the Federal rules.

Judge Hastings' claims of actual prejudice from this missing or lost evidence have at least some demonstrated substance. In his 1983 trial he was able to contrast the physical appearance of Frank Romano with that of the undercover agent, Paul Rico, and argue to the jury—apparently persuasively—that since he (Judge Hastings) knew Frank Romano well, it was obvious that he could not have been a co-conspirator with Borders because his participation in a conspiracy would have prevented Borders from being duped by an individual who could not be mistaken for Frank Romano.

It should also be noted that the 1983 trial proceedings did not include any evidence from or about the government's informant, William Dredge, or events prior to September 1981. Thus phone and travel records relating to Dredge, as well as to the aspects of the case touching on Joseph Nesline, Santo Trafficante, and the activities of the Romano brothers and "Brother" Moscato in March and April 1981, were not part of the trial proceedings—so Judge Hastings had no occasion in 1983 to be concerned about gathering or preserving that evidence.

Of course, whether any of those records or individuals would in fact have provided evidence favorable to Judge Hastings is an open question, but in my view their absence during our 1989 hearings when they were available for the 1983 trial is another reason why we ought today to exercise extreme care in making the "delicate judgment" referred to by the Court of Appeals of whether a fair trial can now be had on these eight-year-old charges.

When voting against the preliminary motion to dismiss on grounds of double jeopardy, I stated then that the jury verdict should be considered at the conclusion of the hearings on the overall issue of fairness. After studying and reflecting on double jeopardy and delay, I believe those issues may warrant dismissal of these impeachment charges, but I think it preferable not to reach those issues since this matter can be concluded on narrower grounds without establishing an unnecessary precedent.

STANDARDS OF PROOF

In matters tried in the courts, the law generally recognizes three different levels of certainty of proof. The lowest threshold, which is that which must be met by plaintiffs in most civil cases, is proof by the preponderance of the evidence—that is, proof that the conclusion urged is more probable than the contrary conclusion. In a case tried on the preponderance of the evidence standard, it is the plaintiff's burden to "tip the scales" and if at the end of the case the evidence weighs evenly for both sides, the jury is required to find against the plaintiff because he is the party with the burden of proof.

For some classes of civil case, however, where the nature and importance of the issues require a greater degree of certainty, the law recognizes a more difficult standard of proof: proof by "clear and convincing evidence." This standard has been held to require proof that a party's position is "highly probable," as opposed to simply more likely than not. The kinds of cases where this elevated standard of proof is invoked vary between jurisdictions, but usually include claims of fraud, claims to enforce non-written contracts and claims of the invalidity of properly recorded patents. This high standard of proof is also required in a libel suit brought by a public official who must show by "clear and convincing evidence" that a defamatory falsehood was published with actual malice.

Finally, for criminal cases, the law imposes an even more rigorous standard of proof, requiring that a conviction may be had only upon "proof beyond a reasonable doubt." The requirement of proof beyond a reasonable doubt is most commonly defined in Federal criminal cases as "proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs." [6] The requirement of proof beyond a reasonable doubt in criminal cases has been said to be evocative of the "deeply held feeling that the combination of all-too-fallible witnesses and serious sanctions requires that the sanctions should be imposed only where guilt seems virtually certain." [7]

The question before us is whether any of these standards is appropriate in the context of this case, where the substantial allegations have already been considered and rejected by a jury under the reasonable doubt standard, and where the passage of time has at least raised a question as to whether a fairer and more complete presentation of the evidence is possible today than it was six years ago when the jury sat.

In the Claiborne impeachment, Judge Claiborne offered a motion to establish "beyond a reasonable doubt" as the standard of proof for that impeachment proceeding. That motion was defeated by a vote of 75 to 15. At the same time, however, the chair made clear that in rejecting reasonable doubt as a standard for the full Senate, there was no intention to suggest that reasonable doubt was not an appropriate standard to be applied by individual senators. Indeed, in Claiborne, a number of senators explicitly adopted a reasonable doubt standard of proof. My own view in the Claiborne matter was that in a case which sought impeachment based directly on charges which constituted violations of Federal criminal laws which had already been presented to and accepted by a trial jury, proof beyond a reasonable doubt was an appropriate standard.

Of course, an impeachment proceeding does not fit neatly into any of the categories of "civil" or "criminal" matters for which the law has clearly delineated standards of proof. Certainly a strong argument can be made that where impeachment articles are based on charges that constitute violations of criminal law, the criminal law standard of proof ought to be applicable. The Supreme Court in *In Re Winship*, 39 U.S. 358 (1970), made clear that the Constitution required use of the reasonable doubt standard in juvenile proceedings, notwithstanding the fact that such proceedings are neither criminal nor necessarily punitive. In its opinion, the Court noted the relation of the necessity for proof beyond a reasonable doubt to the stigmatization produced by a criminal conviction and to the necessity that the "moral force" of the law "not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." 397 U.S. at 363–4. These factors seem to me to be equally at work in an impeachment proceeding. When senators are called upon to vote on an article of impeachment, we do not say "aye" or "nay" as we do on all other occasions. Instead, we articulate our vote by saying "guilty" or "not guilty." I have no doubt that the Senate's vote of guilty in an impeachment is to the officeholder as much a stigma and condemnation as the result in any criminal case, and that consequently such a decision should only be reached based on a standard of proof that does not permit people to have doubt about whether an innocent man has been unjustly condemned or punished. We may recall that when Vice President Agnew pled guilty in 1973 to a criminal charge of tax evasion, he received no jail sentence because, in the view of the prosecutors and the sentencing judge, his resignation from office—in essence his acceptance of the consequence of an impeachment—constituted sufficient punishment.

However, I do not believe it is necessary that we adopt a rigid standard of proof for all impeachments. There is much wisdom in Mr. Justice Brandeis' pronouncement when concurring in *Ashwander* v. *Valley Authority,* 297 U.S. 288, 347 (1936), that Constitutional issues should not be decided ". . . if there is also present some other ground upon which the case may be disposed of." There is no occasion today that requires the determination of the requisite standard of proof for every Senate impeachment trial; indeed, the question of the appropriate standard of proof may well vary with the nature of the allegations or charges. We should remember that, historically, impeachment trials have sometimes dealt not so much with questions like the ones we face here of whether or not a crime was committed, but rather (as in the impeachment trial of President Andrew Johnson) with whether particular conduct constituted an impeachable offense.

In the Hastings impeachment proceeding, for the first time in our history the Senate is asked to render judgment on a Federal official who already has been acquitted by a jury in a criminal trial. What is the impact of that factor? The impeachment committee specifically asked the parties to address that question in their briefs, and I believe this issue has been at the center of much of the public attention to this proceeding. A review of judicial precedents brings little direct help in answering the question because of the application of the double jeopardy principle which I have already discussed: if the subsequent proceeding is "punitive," double jeopardy invokes the prior acquittal as an automatic bar, and if the subsequent proceeding is not punitive, double jeopardy principles do not apply.

Thus, it is necessary to find some judicial analogy which will permit us to apply the principles of fairness that underlie the double jeopardy protection in a context, like impeachment, that has substantial punitive and substantial remedial aspects. Perhaps the most apt analogy in judicial proceedings will be in those situations where a jury's verdict (although not a verdict of acquittal in a criminal case, since that is invariably final) is reviewed by the trial judge, or where a trial judge's factual determinations are reviewed by an appellate court. It is sometimes said that a trial judge "cannot usurp the functions of a jury" and "can only disturb a jury verdict to prevent a miscarriage of justice." [8] What constitutes a miscarriage of justice is not clearly defined in the law, but the concept is commonly applied to mean that a jury's verdict must be sustained unless it is contrary to the "clear" or "great" or even "overwhelming" weight of the evidence.[9]

In a similar vein, the Federal Rules of Civil Procedure say that a district court's findings of fact shall not be set aside by an appellate court unless "clearly erroneous." The Supreme Court of the United States in *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948) said this occurred when: ". . . the reviewing court on the entire evidence is left with *the definite and firm conviction that a mistake has been committed.*" 333 U.S. at 395 (emphasis added). Building on that standard, in *Anderson v. Bessemer City*, 470 U.S. 564, 573, the Supreme Court said: "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." 470 U.S. at 573. As the Court went on to say:

"The reviewing court oversteps the bounds of its duty . . . if it undertakes to duplicate the role of the lower court. . . . '[A]ppellate courts must constantly have in mind that their function is not to decide actual issues *de novo*'. . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."—*Id.* at 573-4 (emphasis in original; citations omitted).

The Supreme Court in *Anderson* explicitly rejected a line of court of appeals decisions by distinguished judges (including Judges Augustus Hand and Jerome Frank) that appellate courts have the right to substitute their own fact findings for those of the lower court if those determinations did "not rest on credibility determinations, but [were] based instead on physical or documentary evidence or inferences from other facts." *Id.* at 574. Even in that situation, the Supreme Court said, there must be "deference to the original finder of fact;" such deference to the original fact finder is all the more warranted, the Court said, when factual "findings are based on determinations regarding the credibility of witnesses." *Id.* at 574-5.

In this case, of course, a jury had the opportunity to see and hear the same witnesses that the Committee did. Indeed, as I have noted, the jury had the opportunity to hear from a number of witnesses who had become unavailable by the time of our proceedings. The principles of fairness and finality that underlie our double jeopardy protections urge that the jury's response to those witnesses and that evidence ought to be substantially credit by us unless some manifest error is shown. The Court's conclusion in *Anderson*, that where "the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one . . . requiring them to persuade three more judges at the appellate level is requiring too much", *id.* at 575, may aptly be invoked here to suggest that where Judge Hastings has already succeeded in the defense of his case before a jury of twelve citizens, it perhaps requires "too much" that years after that fact he undertake the same burden of persuasion before one hundred Senators.

The Senate correctly concluded that it was not "too much" to require Judge Hastings to proceed with his defense on the articles of impeachment. As I believed then, and continue to believe, the mere fact of the House's overwhelming vote for impeachment following upon the recommendations of the Judicial Council of the Eleventh Circuit and the Judicial Conference of the United States required that we hear the case. But, having heard the case, there can be no question that the jury's verdict, rendered much closer in time, and reached after a fair and vigorous trial on both sides, should be given considerable deference in our decision unless it can be shown to have been clearly erroneous, or to have constituted a miscarriage of justice. To simply say that we disagree is not enough.

To sustain a conviction on the articles presented here, the House should be required to prove its case beyond a reasonable doubt; and, for the bribery conspiracy and related perjury articles, must do so in a way that shows that the jury's verdict was clearly in error or constituted a miscarriage of justice.

An appropriate manner to weigh the evidence is with an analysis of the central arguments of the House brief on the charge of conspiracy to obtain a bribe.

EVALUATION OF EVIDENCE SUMMARIZED IN THE HOUSE BRIEF

On key Article I, the corrupt conspiracy to obtain a $150,000 bribe, the House brief argues: [10]

"1. *Pattern of Contacts*"—The House brief refers to contacts between Judge Hastings and William Borders in the same time frame as alleged dealings between William Dredge and Borders. Little, if any, reliance should be placed on Dredge's testimony. There are significant discrepancies between Dredge's testimony at this hearing and the testimony he gave on prior occasions. The existing documentary records for Dredge's phone contacts with Borders tend to confirm his prior testimony that his involvement with Borders did not begin until after his May 1981 arrest. Dredge has a serious criminal record with multiple convictions. At the time of Dredge's contacts with Borders, Dredge has the obvious motivation to extricate himself from pending Federal criminal charges on drug violations.

At the time Dredge dealt with Borders, Judge Hastings and Borders had reason to have contacts on other matters, aside from Hemphill Pride or the *Romano*, case, such as the propsective invitations to President Carter and Attorney General Bell to the National Bar Association meetings or the contemporaneous lawsuit which Borders had against President Reagan.

The House brief then argues:

"2. Three separate times Borders offered proof of Judge Hastings' involvement. Three separate times Judge Hastings complied." (p. 55)

According to the House contention:

"Borders made three separate 'offers of proof' for the purpose of persuading the Romanos that he could control Judge Hastings. In each instance Judge Hastings took the promised action." (p. 55)

The House assertion is not factually correct.

The first was Borders' prediction that Judge Hastings would continue the Romano brothers' sentencing on his own initiative. The evidence is unequivocal that when Judge Hastings took the bench on May 11, he stated that he was prepared to proceed with the sentencing and continued the sentencing only after a request from defense counsel. The House seeks to rebut this key fact by stating:

"Further, Neal Sonnett (defense counsel) may have orally notified Chambers of his desire for a continuance by the close of business on May 8, 1981 . . ." (p. 58)

What Neal Sonnet "may" have done is obviously pure speculation. There is no evidence that he did so.

A second issue cited in the House brief on the three "offers of proof" refers to the promise that within 10 days of the payment on the bribe, Judge Hastings would issue an order returning to the Romanos a substantial part of the forfeited property.

That admittedly did not happen.

The $25,000 was paid to William Borders on September 19. The order was not issued until October 6. In addition, Judge Hastings' law clerk testified that the Judge had directed a return of the Romanos' forfeited property in late August or early September 1981, a date fixed with reference to the Fifth Circuit Court of Appeals opinion of August 27 mandating that result.

The third "offer of proof" in the House brief refers to the September 16 "show" at the Fontainebleau. Judge Hastings' appearance at the hotel on that date is highly suspicious. Judge Hastings testified that he expected Borders for dinner but there is no evidence of a place setting for Borders or other corroboration of such an expectation by Judge Hastings. However, other evidence demonstrated Borders to be unreliable at fulfilling commitments such as appearing at appointments like dinner; but on one contention out of three "offers of proof," there is some circumstantial evidence.

The House brief then argues:

"3. More examples of Judge Hastings' complicity: the April 9 pay phone call; the October 5 coded conversation; the October 9 flight from Washington; Hastings and Borders' Relationship." (p. 72)

The House introduced evidence of a suspicious telephone call on April 9, 1981 from a pay phone in the Miami Federal courthouse to a pay phone in the District of Columbia Federal courthouse charged to Judge Hastings' residence. The House contends that the call was made at a suspicious time based on the suspect testimony of William Dredge. This call was not introduced into evidence at Judge Hastings' 1983 trial. Judge Hastings did not deny making the call, did not remember it and could not recall any purpose for it eight years after the fact. Since the call was charged to his home it is likely that he made it but not conclusive. It is at least somewhat speculative that Borders was the recipient.

The House brief then places great reliance on ". . . the coded telephone conversation of October 5." p. 75. The House asserts:

"The evidence that the October 5 conversation is in code is insurmountable." (p. 81) I strongly disagree with the characterization "insurmountable" and I found the testimony of the expert witness, Dr. Roger Shuy, unpersuasive.

Aside from the contention of a coded conversation, the October 5 call, in conjunction with the so-called Hemphill letters, was suspicious, but hardly rising to the level of the House's contention. The House contends the 5:12 call on October 5 contained a coded communication from Judge Hastings to Borders that the order was going out reducing the forfeiture. But that argument is undercut by the earlier telephone call at 4:22 on the same day from Borders to Rico that the order was going out. The House brief seeks to answer that gap by stating:

"The House submits that during the afternoon or evening of Sunday, October 4, Borders finally reached Judge Hastings after leaving a message at his home." (p. 82)

That assertion is wholly speculative because there is no such evidence. Had that call been made, however, there would have been no reason for the October 5 call from Judge Hastings to Borders.

The House contention is further refuted that Borders' coded communication to Judge Hastings on October 5 was that he had gotten the $25,000 down payment from the statement "he wrote some things for me . . . and then I was supposed to go back and get some more things." Had that conversation been the source of information from Borders to Judge Hastings that the $25,000 down payment had been paid, why would Judge Hastings already have issued the instruction for the forfeiture remittance? The House theory of the case was that such information had long since been communicated to Judge Hastings to warrant the remittance order.

The perfect text of Judge Hastings' handwritten letters for Hemphill Pride is curious, perhaps even suspicious, but Judge Hastings may well be able to draft such a perfect text. Had the draft letters been the product of a thoughtfully contrived plan, a careful contriver would probably have inserted some strikeovers.

The House brief then emphasizes Judge Hastings' failure to disclose the Hemphill Pride letters as circumstantial evidence of guilt. That assertion was directly contradicted by Judge Hastings' testimony that he showed those letters to William Borders' attorney, Mr. John Shorter. The House brief then contends:

". . . the letters, if offered at all, were assumed by Borders' attorney to be fabricated." (p. 91)

No evidence was offered to that effect. It is a House assumption that the letters were "assumed" by Borders' attorney to be fabricated. In proceedings before the Eleventh Circuit, John Shorter confirmed Judge Hastings showed him the draft letters.

The House brief then states "the third compelling indication of Judge Hastings' guilt is the circumstance surrounding his departure from Washington, D.C. on October 9, 1981." Judge Hastings' conduct on that day does show a high state of anxiety and worry, but not necessarily guilt. No matter who sophisticated and poised a lawyer or a judge—or a senator—might be, there would be an understandable sense of concern and anxiety on hearing that the FBI wanted to question that individual, a judge, when a friend had just been arrested for taking a bribe in his courtroom. Anyone would be foolish to respond to that situation by walking into an interrogation without preparation and counsel. Any lawyer worth his salt, as Justice Jackson aptly put it, would insist on reviewing the facts, analyzing the situation and preparing that person, even an experienced judge, before submitting to such questioning.

It is also understandable that a resident of another state would prefer to be in his home area instead of in Washington, D.C. A more reasoned response by Judge Hastings would have been to call the FBI agent and set a convenient date a few days later in his home area for such an interview, but who among us is totally composed and wise at all times under all circumstances? And Judge Hastings did submit to extensive questioning later that day by the FBI at the home of his friend, Ms. Patricia Williams, in Florida.

The final key House contention on the central article I states:

"d. The Relationship of Judge Hastings and William Borders since the Conspiracy Accusation Belies Respondent's Innocence." (p. 88)

This contention essentially relies on the inferences between Borders' illegal activities and his contemporaneous contacts with Judge Hastings. There is no question that Judge Hastings and William Borders had an appropriate personal, social and professional relationship prior to these events in 1981. There can be no guilt by association.

The evidence does not support the House assertion at page 91 of its brief about Judge Hastings' "inexplicably solicitous" attitude toward William Borders. I disagree with the House's conclusions on the basis of my examination of Judge Hastings on this issue. After reflection, it is my sense that Judge Hastings' attitude may well be explained by the expression that he acted more in sorrow than in anger.

Beyond an analysis of the House brief, I note the following as key elements of the evidence which raise at least a reasonable doubt and demonstrate that the jury's verdict was neither clearly erroneous nor a miscarriage of justice:

> "Testimony from Judge Hastings' law clerk, which was uncontradicted, that Judge Hastings had directed a return of the Romanos' forfeited property in late August or early September, 1981, and thus in advance of the $25,000 payment on September 19—a fact totally at odds with the House's theory that Judge Hastings would only return the forfeited property after the bribe downpayment;
>
> "The undisputed evidence that despite Borders' commitment on September 19 that the forfeiture remittance order would go out by September 29, that did not occur. There is no reason why Judge Hastings could not have gotten that order out within that time frame had he sought to fulfill such a commitment;
>
> "The uncontradicted evidence that in a conversation at 4:22 p.m. on October 5, 1981, Borders told the undercover agent that the forfeiture order would go out the next day, prior to the communication with Judge Hastings in which the House alleges that he learned this fact—thus inferentially corroborating Judge Hastings' claim that he was not the source of Borders' knowledge about the case and that the 5:12 p.m. call was innocent;
>
> "The inconsistency in the House's claimed interpretation of the October 5 Hastings/Borders conversation as a code, in that if Borders' statement to Judge Hastings at 5:12 p.m.—"See, I had, I talked to him and he, he wrote some things down for me"—is meant to be Borders' communication to Judge Hastings that he's received the $25,000 downpayment, there could be no basis for claiming that Judge Hastings' direction to his law clerk much earlier in the day to finish the *Romano* forfeiture order was based on the $25,000 payment from Rico to Borders on September 19, because Judge Hastings would not have known about it until he spoke with Borders at 5:12 p.m.;
>
> "The fact that it would be most unlikely for Mr. Borders to have been deceived into believing that Paul Rico was really Frank Romano if Judge Hastings, who was quite familiar with Romano's physical appearance and personality, was truly a participant in the scheme;
>
> "The absence of evidence that the $25,000 paid to Borders on September 19 found its way to Judge Hastings;

> "The background and circumstances surrounding the informant, William Dredge (over whose pretrial deposition I presided), including his criminal history, his ever-changing story and his demeanor, which left me unwilling to accept any part of his testimony as a basis on which to convict Judge Hastings;
>
> "The uncontradicted evidence of Judge Hastings' excellent standing in the community; and
>
> "The uncontradited evidence of Judge Hastings' living a lifestyle that was not lavish, and where financial rewards were not important to him."

On the totality of this record on Article I, weighing the incriminating circumstancial inferences against the exonerating factors and giving due weight to his other unblemished lifetime record, I conclude there is insufficient evidence to convict.

Articles II through IV. For the same reasons that I think the verdict should not be guilty on article I, I reach the same conclusion with respect to the charges that Judge Hastings lied in his 1983 trial. Virtually all the matters that are contained in Articles II through XV, as allegedly false statement by Judge Hastings, were argued by the prosecution to the trial jury as false. Obviously, the jury did not accept those arguments.

Of course, it is not inevitable that we reach the same determination on these articles, or any of them, as Article I. There is always the theoretical possibility that although Judge Hastings may not have been proven guilty of conspiracy to solicit a bribe, he might have been proven to have lied in his own defense. In my judgment, however, such a verdict would be not only wrong but unseemly. To simply prosecute an acquitted man for perjury because he testified to his own innocence violates principles of fairness which have been emphasized as the underpinnings of our constitutional ban on double jeopardy. The courts have recognized that perjury prosecutions following acquittals can be tainted by prosecutorial vindictiveness and subject to dismissal for that reason.[11] It seems to me that if we are not convinced that Judge Hastings conspired to accept a bribe, for the same reasons we ought not to be convinced of the falsity of his testimony in stating that he did not so conspire; and we also ought to accept his testimony that, to the extent he said anything incorrect in his own trial defense, those mistakes were inadvertent. For those reasons, I will vote to acquit on Articles II through XV.

Article XVI. As discussed above, the case against Judge Hastings on the wiretap disclosure article was neither convincing nor substantial. While there was direct evidence in the testimony of Mayor Clark, a number of factors made Mayor Clark a less than wholly credible witness; and a host of contradictory evidence, much of it undisputed, proved convincingly that what Mayor Clark said happened could not have occurred, certainly not in the way that he said it occurred.

Article XVII. Article XVII contains no independent allegations and has no independent evidence to support it. Inasmuch as I intend to vote against impeaching Judge Hastings on the substantive charges against him, I will vote the same way on a "catch-all" article which reiterates previous charges.

FOOTNOTES

[1] Judge Kerner resigned after conviction rather than face impeachment. In 1929 and 1941, two other Federal judges had been subject to indictment, but did not question the jurisdiction of the court to prosecute them before impeachment.

[2] *Claiborne v. United States*, 727 F.2d 842 (9th Cir. 1983), *cert. denied* 475 U.S. 1120 (1986); *United States v. Hastings*, 681 F.2d 706 (5th Cir. 1982), *cert. denied* 459 U.S. 1203 (1983).

[3] *See also*, *United States v. Ward*, 448 U.S. 242, 248–9 (1980); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–9 (1963); *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956). *But cf. United States v. Halper*, 109 S.Ct. 1892, 1901–2 (1989), suggesting that at least in the context of punishment, the Supreme Court remains prepared to apply double jeopardy protections to remedies that are on their face clearly civil if the use of those remedies "as applied in the individual case serves to goals of punishment."

[4] Koch, ed., "Notes of Debates in the Federal Convention of 1787 Reported by James Madison" (1984), at 331–35.

[5] Gales and Seaton's "History of Debates in Congress" (1834), 389, 394–5 (May 19, 1789).

[6] *See*, generally, Devitt and Blackmar, "Federal Jury Practice and Instructions," Sections 11.14 (Reasonable Doubt); 71.14 (Preponderance of the Evidence); and Sections 84.08 and 97.06 (Clear and Convincing Evidence); *See also*, McCormick, LAW OF EVIDENCE, Sections 339–41 (1972).

[7] Goldstein, "The State and the Accused: Balance of Advantage in Criminal Procedure," 69 Yale L.J. 1148, 1153 (1960).

[8] *Beckman v. Mayo Foundation*, 804 F.2d 435, 439 (8th Cir. 1986). *See also Newmont Mines v. Hanover Insurance Co.*, 784 F.2d 127, 132 (2d Cir. 1986); *Payton v. Abbott Labs*, 780 F.2d 147, 152 (1st Cir. 1985).

[9] *See*, *Fireman's Fund Ins. Co. v. Aalco Wrecking Co.*, 466 F.2d 179, 187 (8th Cir. 1972), *cert. denied* 410 U.S. 930 (1973), citing *Cities Service Oil Company v. Launey*, 403 F.2d 537, 540 (5th Cir. 1968).

[10] I found the oral argument on October 18, 1989, by Congressman John Bryant more persuasive than the House brief, and I shall supplement this analysis when the Senate deliberations occur.

[11] *U.S. v. Eddy*, 737 F.2d 564 (6th Cir. 1984); *U.S. v. McFadyen-Snider*, 590 F.2d 654 (6th Cir. 1979); *cf. United States v. Goodwin*, 457 U.S. 368 (1982).

Appendix to Floor Statement of Senator Arlen Specter: The Relationship Between Impeachment Proceedings and Legislative Oversight Functions

After 50 years without an impeachment trial being heard in the Senate, the last three years have seen three impeachment trials: those of Federal judges Harry Claiborne of Nevada, Walter Nixon of Mississippi and Alcee Hastings. Some Senators, including particularly my distinguished colleague from Alabama, Senator Heflin, have expressed a view that the constitutional mechanism for removal of Federal judges established by the Framers is not workable in the context of our contemporary legislative responsibilities, and have urged a constitutional amendment which would remove from the Congress the responsibility for impeachment and trial of inferior Federal judges.

In the 202 years since the adoption of the Constitution, as the country has grown and our legal system become more complex, the ranks of the Federal judges of the district courts and courts of appeals have expanded from 13 to 741. It may be that with so many Federal judges impeachment trials will become more commonplace, placing difficult demands on the already crowded agenda of the House and Senate. For this reason, some argue, the Constitution should be amended so that the Congress would retain responsibility only for impeachment proceedings against members of the executive branch and the Supreme Court—with problems of corruption or disability of all other Federal judges assigned to some other tribunal.

Before participating in Judge Hastings' impeachment hearings, I favored such a constitutional amendment. After serving as vice-chairman of the Impeachment Trial Committee, I now believe that the issues raised in any judicial impeachment, including judicial integrity and independence of the judiciary, are sufficiently important to require our attention notwithstanding our other workload. Speaking with respect to the Senate, I believe that through the use of Rule XI committees, and with diligent and consistent effort by the members of those committees and of the full membership, we have been able to discharge our constitutional obligations in the Claiborne, Nixon and Hastings proceedings appropriately, and without detracting from our other responsibilities.

Additionally, my experience as a member of the Hastings committee has convinced me of another reason that it is important that the Congress and the Senate remain a part of the impeachment process even at the level of inferior Federal judges. As Members of the national legislature, both Representatives and Senators have oversight responsibility of many of the organs of our government involved in the criminal justice system. In the three impeachment proceedings recently concluded, the Members of the impeachment committees—and indeed the whole Senate—have had an opportunity to hear and observe in a concentrated way matters which ought to raise serious concern over how some of the agencies of the executive branch and the courts for which we have oversight responsibility have operated.

In the Hastings impeachment, we had occasion to hear a great deal that was disturbing regarding the functioning of the FBI, the Department of Justice, and even the Eleventh Circuit Investigating Committee operating under the strictures of our recently enacted Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. 28 U.S.C., secs. 331 *et seq.* In the Hastings impeachment we heard evidence, among other things, that an FBI agent who was directed to conduct a telephonic interview of Judge Hastings told Judge Hastings that he was "not under investigation" when in fact the FBI was at that very moment urging the Justice Department to target Judge Hastings for indictment; in questioning that I put to him that FBI agent justified his conduct as follows:

> *Q*: Would there be some circumstances where you would feel justified in saying to Judge Hastings that you were not investigating him in response to his question, when in fact you were investigating him?
>
> A: That could be a situation as well.
>
> *Q*: Well, under what circumstances could that be your approach?
>
> A: Possibly in those circumstances to see if there might be a possibility of soliciting additional information from a subject of a target, you would not want to disclose that that person [was] the subject of an investigation.
>
> *Q*: Well, would you consider it proper to say to a man under investigation in response to a direct question by him, that he was not under investigation, when in fact he was?
>
> A: It would depend on the situation, but in certain circumstances I could see where I would not want to disclose the fact that the person is the subject. It just depends.

I for one do not believe that this is appropriate policy for the FBI or the Justice Department.

In addition, testimony in the *Hastings* case revealed what I believe a number of Committee members felt was a significant misuse of the subpoena process. On Friday, October 9, 1981, the day William Borders was arrested, a number of FBI agents arrived at Judge Hastings' chambers in Miami. They were not in possession of a search warrant, but had with them a subpoena *duces* *tecum* requiring the production of documents before a grand jury the following week. Armed only with that subpoena, they demanded that all the documents called for be delivered to them forthwith; they refused to let people come and go in Judge Hastings' chambers; they separated Judge Hastings' personnel from each other; they told a federal magistrate who had come to Judge Hastings' chambers that he was required to leave; and they used the occasion to look through papers on the top of Judge Hastings' desk. This conduct is particularly troublesome because, it must be remembered, the FBI and Department of Justice are themselves parties to many matters that would be before Judge Hastings. The use of a subpoena *duces tecum* as if it were a search warrant, entitling them to the free run of Judge Hastings' chambers, raises the possibility of the disclosure of the judge's thoughts and work in progress on matters in which the government is a party in a way that could severely prejudice the rights of the parties adverse to the government. We ought to find out if that kind of procedure is accepted by the Department of Justice and the FBI as appropriate and routine behavior in the course of serving a subpoena; if it is, we ought to give serious thought to whether some statutory restraint should be interposed.

In addition, the events in this case revealed that significant portions of the evidence against Judge Hastings, which were subject to grand jury secrecy, appeared in the Miami newspapers almost immediately after Borders' arrest. Despite a massive investigation by the Justice Department, no conclusion was reached as to how that could have occurred.

In the Hastings impeachment we also had occasion, possibly for the first time, to have a close examination of the functioning of a judicial investigating committee under the 1980 Judicial Councils Reform and Judicial Conduct and Disability Act. I believe it is safe to say that I and a number of my colleagues were distressed by what we observed. Under the statute, there is no provision giving witnesses who appear before the Investigating Committees the right to be represented by counsel, and each of the various Judicial Conferences are largely free to establish their own rules of procedure. 28 U.S.C. 372(c)(11).[1] While the investigating committees' procedures may be likened to those of a grand jury, with similar needs for secrecy, at least in the grand jury setting there is opportunity to have any arguably improper or overreaching conduct by the prosecutor reviewed by a supervising judge. Here, by contrast, the supervising judges are themselves the investigators, with the result that, at least based on what we observed in the Hastings investigation, the rights of those appearing as witnesses, and those under investigation, may not be fully protected.

For instance, when Joel Hirschhorn appeared as a witness and attempted to assert attorney/client and work product privileges for a memorandum that he had prepared in the course of defending Judge Hastings, the presiding judge, without benefit of brief or argument, simply stated that "the committee has determined that [Mr. Hirschhorn's memorandum prepared as a checklist of things to do in defending his client] is not privileged or protected under the attorney's work product or that it has been waived."

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[1] *See*, Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. of Pa. L. Rev. 283 (1982).

Similarly, another attorney, Kenneth Robinson, was directed to testify concerning his conversations with an individual who had sought his representation, William Dredge, without any opportunity for Dredge to contest the summary denial of any attorney/client privilege Dredge may have had for his conversations with Robinson.

Finally, I note that the Investigating Committee's questioning of Judge Hastings' former law clerk, Jeffrey Miller—undertaken in a context where Mr. Miller had no counsel or representation of his own—had an offensive quality about it. The Investigating Committee, which had called Miller to testify before it for the third time, simply refused to accept testimony that Miller was giving that was favorable to Judge Hastings. For example, note the following "question" directed to Miller by one of the presiding judges:

> Let's get down with it now. How much did the instructions have to do with it? You have attempted to explain not by saying, well, if you hadn't followed the instructions, the judge would have signed it anyway, if that is so, why did you change it? Why did you obey his instructions if you thought had you followed your original theory that he would have signed it anyhow?
>
> This takes a lot of explaining, and we haven't heard yet, Mr. Miller, and we are searching for the truth in this thing.

This questioning, it must be remembered, was directed to a young lawyer, unrepresented by counsel, in a proceeding where the displeasure of the inquiring judges at his testimony was manifest; there is a very real feel of the star-chamber in such an examination. It suggests that the judges may have moved well beyond being inquirers and have become instead inquisitors.

It may be that as a result of our observations in the Hastings impeachment proceeding we will now want to give consideration to whether witnesses before judicial investigating committees should be guaranteed the right to be represented by counsel, or whether we will want to take more direct control over the manner in which such investigations will be conducted. It may be that Congress should amend the Judicial Councils Act to establish rules of procedures which will guarantee fairness to witnesses, and to the subjects of investigation, and to provide a mechanism for appropriate review so that the judges conducting such an inquiry are not also themselves the arbiters of the propriety of their own conduct.

I think it is important also to take note that it is not just in the Hastings impeachment where the Senate has heard evidence that ought to give us concern about the operations of the criminal justice system and certain aspects of the judiciary. In the recently concluded Nixon impeachment hearings, it was a central point of the defense case that the principal witnesses against Judge Nixon had their testimony shaped and coerced by overaggressive prosecutors. Having not myself yet had a chance to consider the evidence in the Nixon case, I make no judgment as to the truth of those allegations, but I do note their disquieting similarity to some of the matters that we heard in Hastings and in Claiborne.

Indeed, in the Claiborne case, although we voted to convict Judge Claiborne, I believe many of us left that proceeding with a genuine sense of distress regarding what we had seen presented to us regarding the conduct of the Justice Department and the IRS. We saw disturbing demonstrations of selective targeting of subjects for prosecution, manipulation of evidence and witnesses, and other misconduct. Other than myself, 17 Senators had occasion to file floor statements discussing their reaction to the events in Claiborne. Of those 17, 8 (or nearly half)—Senators Bingaman, Hatch, Pryor, Heflin, McConnell, Bumpers, Levin, and Gore—had occasion to observe that the prosecutorial and governmental misconduct that they observed in the *Claiborne* case ought to be the subject of further inquiry. As Senator Bingaman put it: "It is clear from the debate which has taken place here in the Senate that many members are concerned not only about the evidence of overreaching by the Government in this case, but other instances of similar overreaching."

Senator Bingaman went on to call for the Judiciary Committee to hold oversight hearings. My other distinguished colleague, Senator Pryor, similarly observed: "There is no responsible doubt in my mind about another aspect of this case, and that is the long arm of the United States Government and the abuse of power that ultimately led to Judge Claiborne's conviction."

Similarly, Senator Levin commented: "I was greatly disturbed by the conduct that the government was alleged to have exhibited in this case. The evidence clearly suggests that the Government engaged in a pattern of selective prosecution, prosecutorial overreaching and perhaps intimidation of witnesses and other improprieties. I support a full investigation of those charges as they relate to Mr. Claiborne in particular and other cases as well."

Notwithstanding the views of these senators, no such hearings have as yet been held. I believe with what we have now seen in the Hastings and Nixon matters, time is past due for such hearings. We have a need to balance zealous and effective law enforcement and judicial administration with respect for the rights of citizens and their constitutional protection.

None of these matters would likely have come to our attention but for the Constitution's requirement that we undertake the obligation to try impeachment cases. I know that four weeks of full hearing days in the Hastings impeachment was a considerable burden for me and for my 11 colleagues on the Hastings committee. I am sure that the time commitments of the 12 senators on the Claiborne and Nixon committees represented an equally significant measures of effort and inconvenience for them. I know the difficulties for this entire body of the time that is spent considering and deliberating these matters on the floor.

I know also that impeachments present additional difficulty for us in that most of us have never had the occasion to act as judges where we must call a man guilty or not guilty, and we may perhaps find that role difficult.

For all that, however, I believe that there is an overriding value in the Senate continuing to act as the body that tries the impeachment of all federal officials including federal judges. We enact laws that govern the operations of the FBI, the Justice Department and the IRS, as well as the administrative functioning of the courts. Sitting as judges in an impeachment proceeding we have occasion to see in a closeup and firsthand way how those laws and the agencies they affect operate. That experience, difficult and time-consuming as it may be, makes us wiser in the discharge of our legislative responsibilities.

CONCLUDING COMMENTS OF SENATOR SPECTER ON OCTOBER 28, 1989

Mr. SPECTER. For the record on the proceedings of the impeachment of Judge Hastings, I am including the written statement which I circulated to my colleagues on October 19, 1989, the appendix to that statement, the oral statement which I made in the Senate's deliberations on October 20, 1989, plus these few supplemental thoughts.

The 7 hours of debate and deliberations by the Senate on October 19 confirmed my view expressed in my written statement that the Constitution should not be changed so that the Senate should continue to make the ultimate decision on impeachment proceedings. Judge Hastings' case presented many complex issues which meritted a judgment by the U.S. Senate. The independence of the Federal judiciary is one of the highest values in our society, and there is no better body than the U.S. Senate to make the ultimate decision on removal of a judge, especially in the context of the racial overtones, the jury acquittal, the long delay, the complex facts and the circumstantial evidence.

After much reflection, it is my firm judgment that there is one major error in the impeachment process and that is the absence of a defined standard burden of proof. In the impeachment of Judge Claiborne, the Senate expressly rejected establishing the standard of proof beyond a reasonable doubt with the result that each Senator is left to apply his or her own standard on that important issue.

For many reasons, I believe that is a major mistake. The Respondent, as a matter of fundamental fairness, is entitled to know the standard by which he is being judged. The public has a right to know the applicable standard. It is not sufficient to say that the standard on burden of proof is left to the individual judgment of each Senator because that leaves the matter vague, indefinite, speculative, and subject even to individual whim or caprice. The Senate prides itself on being the world's greatest deliberative body. On many matters, it is not realistic to articulate a precise standard for the judgment on treaties or nominations or public policy on legislation. However, in an impeachment, it is my view that the Senate ought to establish a standard on burden of proof so that all will know what the rules are.

Beyond these considerations, the establishment of a standard on burden of proof would help the Senators themselves. During the course of our long hearings, members of the committee would repeatedly ask and discuss among ourselves what was the appropriate burden of proof. During the deliberations and in the corridors and in the dining rooms, my colleagues would ask what was the appropriate standard, saying that they were at a loss for the context in which to judge the complex case. I heard a number of my colleagues, who voted guilty, state that they would have voted not guilty if the standard had been proof beyond a reasonable doubt. The prevailing view seemed to be that a lesser standard, even less than clear and convincing evidence, was appropriate to remove a Federal judge from office.

I totally respect the judgment of my colleagues in disagreeing with my view of the appropriate standard on burden of proof, but I do believe that standard should be established. It is inappropriate for the Senate as a whole or individual senators to render judgment without an established procedure including a known standard on burden of proof.

The Senate deliberations focused squarely on the difference on impeachment with removal from office contrasted with the judgment of guilt in a criminal case. Those deliberations were very illuminating as Senators approached these issues with various perspectives.

Reflecting back on the entire process, for me it boils down to a case of the United States of America versus Alcee L. Hastings whether it was the criminal case, the Eleventh Circuit judicial proceedings, the indictment process in the House or the final judgment in the Senate. After the jury acquittal, the unavailability of key witnesses and documents in 1989, and the overall process pitting the Government against an individual over an 8-year proceeding, it seemed to me that Judge Hastings should be ousted from office only if the case was proved beyond a reasonable doubt. I found the charges not proved.

STATEMENT OF SENATOR CHARLES E. GRASSLEY

Mr. GRASSLEY. Mr. President, Federal judges are, under our Constitution, afforded lifetime tenure during times of good behavior. This provision of article III is the cornerstone of an independent judiciary.

But in exchange, Federal judges must subscribe to the highest ethical and moral standards. Like "Caesar's wife," they must be, simply, beyond reproach, even suspicion. By their actions, judges must not undermine the integrity and impartiality of the judicial branch of Government.

At issue is, quite frankly, the public's trust and confidence in the officials who constitute our judicial branch. Inasmuch as the public cannot remove a Federal judge from office, it is left to the legislature to protect the public trust and confidence in the judiciary. Thankfully, the House and Senate have only rarely been asked to take the ultimate step of removal from office by impeachment.

That this great power is rarely employed does not, however, mean we should retreat from it when appropriate.

By his actions in 1981 and at his subsequent trial, Judge Hastings has gravely damaged the public's trust and confidence. At one time or another, every branch of our Federal Government has called into question the conduct and integrity of Judge Hastings: the executive, when the Justice Department brought the indictment in 1981; the judiciary, by the Eleventh Circuit council recommendation to impeach in 1986; and the legislature, by the House vote of 413 to 3 last year to impeach for various high crimes and misdemeanors and malfeasance in office. This is unprecedented.

To absolve Judge Hastings of these charges—any one of which, if true, being enough to remove him from office—we are asked to resolve virtually every damaging, though ambiguous, fact situation in his favor.

This I cannot do.

Is the evidence presented by the House unambiguous? Admittedly not. Are there vexing questions still remaining—perhaps answerable only by those who cannot or will not speak? Assuredly yes. Can one, or even a handful, of these events be explained as an innocent coincidence? Yes, again.

But these facts, marshalled by the House—circumstantial as they are—when taken together, overwhelm any standard of proof appropriate for an impeachment. They point toward a corrupt conspiracy for Judge Hastings to trade his high office for personal gain, to fabricate documents to prove his innocence, and to repeatedly lie under oath in order to secure his acquittal at a criminal trial.

An acquittal fraudulently obtained is entitled to no weight in this proceeding. To suggest otherwise is to mock our judicial system. Indeed, this fraud is yet another independent ground on which to remove Judge Hastings from office.

The Senate is a body in which lawyers predominate. And in a proceeding such as this, issues such as the standard of proof, or how to weigh the prior acquittal are most comfortably addressed by my lawyer-colleagues.

Yet there is a danger that proceedings like these can become "over-lawyered." Human instinct and common sense ought not to be on holiday here.

In that light, two particular facts—each undisputed—are especially telling for me.

The first is Judge Hastings' inexplicably moderate attitude toward William Borders—a man who for 8 years has been his tormentor. We know Judge Hastings is capable of outrage toward his accusers because, at various times, he has attacked their integrity, motives and credibility. Yet for Mr. Borders, the central accuser in this proceeding, Judge Hastings has only sorrow, not anger. Judge Hastings has never called Mr. Borders to testify on his behalf, even though Mr. Borders holds the key to ending the judge's ordeal. This is, I suggest, implausible; as was, I submit, Judge Hastings' explanation for it before the Impeachment Trial Committee.

Second, we are asked by Judge Hastings to believe that Mr. Borders was conducting a unilateral scam of notorious and dangerous underworld figures, such as Santo Trafficante, without any assistance from the judge. This is, I submit, incredible. Candidly, for Mr. Borders to so unilaterally act could only be explained by his having a death wish.

Accordingly, based on the overwhelming record, I will vote "guilty" on articles I, II, through XV and article XVII.[1]

STATEMENT OF SENATOR TERRY SANFORD

FBI MUST LEAVE STINGER IN VICTIM

Mr. SANFORD. Mr. President, today, the Senate voted to impeach Judge Alcee L. Hastings. Impeachment requires a two-thirds vote of the Senate and the vote was a close one. I voted "not guilty." The following explains my vote:

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[1] On Article XVI, the alleged disclosure of confidential information charge, I will vote "not guilty". On this article, I find the evidence insufficient and a motive totally lacking.

An impeachment proceeding puts a Senator in the position of a juror and one has to determine whether the Government has carried its burden of proof. Jurors differ. Senators differ. Voting "not guilty" were the chairman and vice chairman of the Senate Impeachment Trial Committee, Senators Bingaman and Specter. That committee held 18 days of hearings and split 6 to 6 on guilt. Senator Howell Heflin of Alabama, whose integrity I greatly admire, former chief justice of the Alabama Supreme Court, voted "not guilty." It was not an ideological vote; Senator Armstrong, a staunch conservative Republican, voted "not guilty," and Senator Kennedy voted "guilty." Each had to vote his or her own conscience.

My final determination was based on the burden of proof. The FBI failed to prove its case. It must be noted that this case was a sting operation set up by the FBI. There was no real bribe attempt. It was made by an FBI agent with FBI money. The FBI blew its case. They handed the cash to the supposed accomplice, then panicked and arrested him immediately, not waiting to see whether he would take it to Judge Hastings. The FBI then spent millions of dollars to build a case of circumstantial evidence to prove that Judge Hastings might have taken the money.

Sting cases border on illegal entrapment and are subject to abuse, so the FBI must take every precaution to nail down real evidence.

In this case, the FBI did not obtain real evidence. They could have waited and proved clearly that Judge Hastings would or would not have taken the bribe, but they did not wait. They didn't prove their case.

My message to the FBI is that if you are going to carry out a sting operation, you had better leave the stinger in the victim.

STATEMENT OF SENATOR ORRIN G. HATCH

Mr. HATCH. Mr. President, today we are at the final stages of one of a handful of unique governmental processes in which a single U.S. citizen can find him or herself battling, essentially alone, against the entire fabric of the Federal Government. There are only a few such procedures, and we do not invoke them very often, but when we do, these activities can produce dire consequences for the individual and his or her family. An independent counsel investigation is one such example. The impeachment before us today is probably the ultimate in such processes.

In Judge Hastings' case, we find an individual who truly has "battled" against the entire Government. He has endured an exhaustive investigation by the executive branch of the Government, and the results of that investigation have been reviewed not once, not twice, but eventually four times by the other two branches of the Government. First there was a jury trial, in which he was acquitted. Then, there was an inquiry by his judicial peers. The judge next appeared before the House of Representatives, and finally he finds himself here for a trial by the Senate. Before we convict him and remove him from office, we need to be convinced he merits that severe sanction.

As has already been noted before this body, this is, in a sense, a case of first impression. While a handful of judges have been impeached in the past, this is the first instance in which the judge has first been acquitted by a jury in a trial based on essentially the same charges. In my review of these earlier impeachments, I am for the most part satisfied that the Senate reached a correct decision. I am, however, concerned that this time, our consideration of this matter may produce the wrong result.

Earlier this year, this body debated charges that this impeachment process should have been barred by the Fifth Amendment's double jeopardy clause. I am still of the opinion, as I was then, that the double jeopardy clause is irrelevant to impeachment proceedings. I also agree with several of my colleagues who have expressed their opinion that the Senate is not bound by any previous jury or court verdict with respect to a government official facing impeachment. If the Senate were simply to follow the results of a judicial proceeding in reaching a decision on an issue as important as an impeachment, we would be doing a serious disservice to the principles underlying our Constitution and we would severely trample the rights of those facing impeachment. We would also render the impeachment process superfluous in those cases covering charges already adjudicated in the third branch of Government. That seemed to be the prevailing understanding during the Claiborne impeachment, and I think it is equally applicable today.

Nevertheless, I believe that the findings of a jury should be accorded some weight. In Judge Hastings' case, the jury heard much of the same evidence that was pesented before the Senate Impeachment Committee. That panel reviewed these facts when they were much fresher and when some of the key figures were still available to present testimony. In addition to all of the other information that has been placed before this body, that is a fact that I think we should include in our consideration.

The case against Judge Hastings is based primarily upon circumstantial evidence. The evidence admittedly raises troubling questions and casts suspicion on the Judge's conduct. But for each scenario painted by the House managers with respect to given fact situations, the judge, either through his testimony or the testimony of other witnesses, has provided a plausible explanation that, in turn, casts doubt on the proper interpretation of the facts.

For example, the House relies heavily on contacts between Judge Hastings and Mr. Borders surrounding significant events in the bribery scheme. While the House managers have urged that their explanation of these facts can be the only explanation, I find many of the judge's explanations to have plausibility. We are, after all, talking about two men who had been close friends for most of their lives. There were undoubtedly many events that brought them into contact or required some form of communication. If we were to rely on some of the impressions left in the record, these key events would be viewed as the only times that they contacted each other. However, if we had a record of every contact that occurred between these two men before, during, and in between these key events, I would not be surprised to find that the frequency of their contacts does not show much fluctuation.

The prosecution also stresses such facts as Mr. Borders' inside knowledge of the Romano brothers' case. While such knowledge may have come from the judge, it is equally plausible to believe that the knowledge came from outside, even underworld, sources, as Judge Hastings has suggested. It is also within reason to believe that the judge was manipulated into making the infamous appearance at the restaurant, once the bribery scheme was under way. The judge's account of that event is not inherently unbelievable.

Also, with respect to the restaurant event, much is made of the exactness of Mr. Border's prediction that the judge would appear. Judge Hastings would like us to focus with equal interest on the fact that Mr. Borders was way off on his prediction as to when the order regarding the forfeited property would be issued. Instead, we are again urged by the House managers to focus on the contacts between the judge and Borders between the predicted date and the actual date of issue of the order. In response, the judge refers us to the explanation that he offered in his testimony, that he was drafting letters, at Mr. Border's request, on behalf of Hemphill Pride. Again, both explanations are believable.

At this point, however, I must express my discomfort with the House manager's heavy reliance on the so-called "coded" telephone conversation regarding the letters. Frankly, I find Judge Hasting's explanation for this recorded phone call as believable as the interpretation expressed by the House managers. It is not unreasonable to believe that the judge and Mr. Borders were talking about actual letters and that Mr. Borders was not exactly truthful when he told the judge that he had spoken to Mr. Pride about the letters or their content. After all, we are talking about a person for whom there was direct evidence that he was involved in the bribery scheme. If he was willing to deceive his friend the judge with respect to the bribery scheme, it is not unreasonable to believe that he may have not been totally truthful with his friend in other matters.

Let me turn to the judge's actions after the arrest of Mr. Borders, which the Judge learned about while in a Washington hotel room. I can only say that again, the House asks us to rely heavily on circumstantial evidence in drawing the conclusion that the judge's actions prove that he was a part of the bribery scheme. I, too, am troubled by his conduct. Judge Hastings has testified that his actions were probably a mistake on his part. But I can understand how a person learning that a close friend had been arrested, that the FBI wanted to talk to him, and suspicious of the FBI, rightly or wrongly, would make a panicky reaction. I think it is fair to say that the FBI has not had a totally spotless record over the years. And the judge certainly did not seek to hide out from the FBI. We are left with deciding whether to believe the conjecture of the House as to why the judge returned to Florida or to believe the explanation offered by the judge. Since the FBI agents in the case did not "let the money run," we are left with only circumstantial evidence.

Finally, with respect to the charge of the wiretap leak, as best as I can understand, we are left to decide between the testimony of two witnesses—Mayor Clark, to whom the information was supposedly leaked, or Judge Hastings, who maintains that Mayor Clark is simply lying. And again, I would note for my colleagues that we are given two equally plausible explanations as to what actually happened.

Given the degree to which the prosecution relies on circumstantial evidence; and I would also note that there is little, if any, direct evidence; and given the fact that Judge Hastings has provided, in my view, plausible explanations for each of the fact situations presented by the House managers, I believe that the benefit of the doubt must be given to Judge Hastings. I do not believe that the House managers have met their burden of proof, regardless of whatever standard of proof my colleagues might wish to apply.

For me, the circumstantial evidence that exists in this case does not provide the kind of clear and convincing proof which demonstrates that the judge should be removed from the bench.

I would also like to focus on a few other issues that have influenced my decision. First, there is the elapsed time between the events in question and this trial before the Senate. Granted, there are other impeachment cases which have occurred even later from the date of the events than this case. But here we are confronted with the lack of certain key witnesses, such as Mr. Borders and the Romano brothers, and missing evidence, such as conclusive reasons why the Judge and Borders spoke so frequently. As Judge Hasting's counsel noted in his closing remarks, not only are we being asked to look at a part of the donut and assume that there was a whole donut, but we are also asked, in some instances, to look at a hole and assume that there was a donut.

Mr. President, this is a very difficult matter. But just as the jury was not convinced that Judge Hastings was guilty of committing any crime, I am not convinced that Judge Hastings is guilty of committing an impeachable offense. I have carefully followed the Senate proceedings and feel comfortable with this decision. Based solely on the merits of this case, I will vote to acquit on each of the articles of impeachment.

STATEMENT OF SENATOR CHRISTOPHER J. DODD

Mr. Dodd. Mr. President, today I voted to find Judge Alcee L. Hastings not guilty on all of the articles of impeachment adopted by the House of Representatives.

To participate and vote in an impeachment trial is one of the most difficult and troublesome responsibilities for a Member of the Senate.

I have examined the evidence against Judge Hastings carefully. The evidence on all of the charges against him was circumstantial. Circumstantial evidence, of course, can be very convincing, but not if its elements are themselves subject to serious doubts and possible alternative interpretations as was the case in the trial before us.

In a prior criminal trial Judge Hastings was found not guilty by a jury on the central conspiracy charge of this impeachment process. This acquittal in itself should not be controlling for the Senate, but it is another element in a series, raising questions about the validity of the charges.

While I have found the evidence on articles I through XVI wanting in persuasive power, I am altogether opposed to the idea of an omnibus article, article XVII in this case. In spite of the fact that an omnibus article has usually been part of the charges in the impeachment trials of the 20th century, I am not convinced of either the necessity or the fairness of separately voting on such an article. It seems to me, that an incriminating charge should be able to stand by itself as the basis of an article of impeachment. If a charge is too weak, either in the evidence that supports it, or in its relevance in establishing serious misconduct, then that charge should simply be omitted, instead of being repackaged in a so-called catchall article.

I feel reinforced in my doubts by the fact that the 12 members of the Senate Impeachment Trial Committee, those of our colleagues who directly participated in receiving evidence and taking testimony in this matter, split by the narrowest margin, seven of them voting "guilty" and five of them "not guilty" on the articles that formed the core of the charges. The latter five included the chairman of the committee, Senator Bingaman, and the vice chairman, Senator Specter. I want to take this opportunity to commend them as well as every member of the Trial Committee for the splendid service they provided for the Senate in preparing this difficult case for trial. It was a job of many hours of arduous work and precious few rewards beyond the satisfaction of doing an important service to the Senate and the entire Nation. They are due a large measure of gratitude.

Mr. President, impeachment is a rare and extraordinary procedure under our Constitution. Given this fact and given the numerous uncertainties in the evidence presented, I could not satisfy my own conscience that Judge Hastings is guilty of any of these charges and deserves removal from his office.

STATEMENT OF SENATOR CARL LEVIN

Mr. LEVIN. Mr. President, I am satisfied that Judge Hastings acted jointly with William Borders in the furtherance of a corrupt scheme as set forth in article XVII and that he lied and fabricated documents. So I will vote to remove him from office.

I do not believe that it has been satisfactorily proven that Judge Hastings conspired to obtain a bribe by agreeing to cut the sentence of the Romanos. Therefore I will not vote to convict under article 1. What I am satisfied Judge Hastings did was to act, at least to the extent of timing his order for the return of the Romano property, to assist Borders in Borders' corrupt scheme to obtain money from the Romanos.

I cannot believe that the phone conversation of October 5 between Judge Hastings and Borders was really an innocent one about getting some letters written to help their friend Hemphill Pride. I believe it was a signal relative to Borders' scheme to obtain money from the Romanos.

Judge Hastings would have us believe that Borders had been pressing him for months to write these "letters for Hemp" and that he had been resisting. Yet, when Judge Hastings says, in his version of the October 5 conversation, that he has finally changed his mind and drafted the "letters for Hemp," Borders simply says "um hum."

Borders does not thank Judge Hastings for finally agreeing to what he had been asking for months. He does not say that this is going to be a big help to Hemphill Pride. He does not ask why Judge Hastings has changed his mind and Judge Hastings does not explain. In fact, there is no further discussion of the letters at all, except for Judge Hastings' statement that he will "send the stuff off" in the morning—which he did not do.

It is just not plausible that this conversation is the culmination of months of discussion in which Borders pressed Judge Hastings to write the letters and Judge Hastings resisted on the grounds that it would be a violation of the canons of judicial ethics.

Hemphill Pride denied that he knew anything about any letters being written for him and stated that he would not have had anything to do with such an effort.

In support of his innocent view of the October 5 phone conversation, Judge Hastings argues that he and Borders were obtaining letters for Hemp without Hemp's knowledge. Judge Hastings produced draft letters for Hemp that he claims he wrote for Hemp while on the bench conducting a trial—but which letters were never sent because he changed his mind.

I find that implausible because the letters are so perfect, given the circumstances under which they were handwritten, and those letters did not surface for Borders' trial, although, if they were authentic, they were also very exculpatory of his close friend Borders.

The letters surfaced just in time for Judge Hastings' trial. That strains credulity beyond acceptable limits.

As I supposed in my question to the House on Wednesday, I would have preferred if they had called Mr. Borders' attorney, John Shorter, as an additional witness relative to the authenticity of the "letters to Hemp." Nonetheless, I am satisfied on the basis of the evidence presented that these letters were not in fact authentic.

The innocent view of the October 5 conversation, the view that it really was about letters for Hemp, strains the imagination for another important reason.

During the October 5 conversation, Borders said that: First, he "heard from" Hemp; second, he had "talked to" Hemp; and third, Hemp "wrote some things down" for him. Hemp testified that none of those things had happened. That means that Borders was lying to Judge Hastings in that conversation if one credits Hemp's testimony—and just about everyone found Hemp's testimony convincing.

So one can argue that Judge Hastings could have written his "letters for Hemp" without Hemp's knowledge and still credit Hemp's testimony. But if one credits Hemp's testimony and also adopts Judge Hastings' innocent view of the October 5 conversation, it still means that Borders was lying to Judge Hastings in that conversation.

I have not heard any plausible explanation for why Borders might have lied to Judge Hastings about his contacts with Hemp.

For a number of reasons then, I conclude that the conversation of October 5 was not innocent.

My conclusion about Judge Hastings' participation in a corrupt scheme and fabrication of documents is reinforced by Judge Hastings' precipitous flight from Washington after Borders was arrested. I do not believe that his explanation of that departure, including his decision to go to BWI rather than National Airport, is credible and I believe this is further evidence of his guilt.

Because I believe Judge Hastings had a corrupt relationship with Borders, lied under oath and falsified documents for his criminal trial, I will vote to convict him under article XVII as well as vote to convict him of a number of counts of lying under oath and fabrication of documents.

STATEMENT OF SENATOR SLADE GORTON

Mr. GORTON. Mr. President, the impeachment trial of Federal District Judge Alcee L. Hastings of the southern district of Florida was not the case that some made it out to be. This case was not about complicated principles of law. It was not a case about the definition of double jeopardy. It was not about the staleness or ripeness of evidence. It was not about the degree of burden of proof. It was not about the effect of a jury decision. It was about facts, facts which are not substantially in dispute, though certainly some of the inferences to be taken from those facts were arguable.

I tried to deal with this case as a reasonable human being by the use of intelligence and experience. I tried to view this serious allegation in the way a normal person would, observing and inferring logical consequences from what was said and done.

Seventeen articles of impeachment were before the Senate. Yet, only one fundamental question needed to be answered "yes" or "no." That question: Was Judge Alceee Hastings a conscious participant in a proven plan or conspiracy by William Borders to extort $150,000 from two Mafia chieftains in return for unlawful interference in their sentencing proceedings?

Those who answered that question in the affirmative voted to convict Judge Hastings on most of the articles of impeachment, save No. XVI. For those who answered in the negative the answer to that question found Judge Hastings to be not guilty.

Of all of the witnesses who appeared before us, three were particularly important, as a matter of fact, were absolutely key to our decision. The judge, Alcee Hastings; the alleged coconspirator, William Borders a prominent District of Columbia lawyer and President Carter appointee who was president of the National Bar Association and a very sophisticated individual; and Hemphill Pride, who was Judge Hastings' best friend and a good friend of William Borders.

Mr. Borders and Mr. Pride were both long-time friends and associates of Judge Alcee Hastings. Transactions among these three were not arm's length transactions involving strangers. They were the dealings and relationships of close friends, allies and associates.

Hemphill Pride did not have firsthand knowledge of whether a conspiracy existed between Judge Hastings and Borders, nevertheless for all practical purposes Mr. Pride destroyed Judge Hastings' alibi that the transactions between Borders and Hastings were on his, that is to say, Pride's behalf. In spite of Pride's close friendship with the judge, in spite of the fact that they were godfathers of one another's children, Hemphill Pride destroyed the alibi presented to us by Judge Hastings on several of the central issues in this case.

In early 1982, in Columbia, SC, Judge Hastings, in preparation for his upcoming criminal trial, spoke with Hemphill Pride. Mr. Pride insisted on driving Judge Hastings to the airport after the interview. Both before the Eleventh Circuit Investigating Committee and the Senate Impeachment Committee, Hemphill Pride testified that in the car the judge had said to him that it was important for him to remember that Hastings and Borders were trying to draft letters to help him, when in fact, Mr. Pride knew nothing about such letters, and wanted no such letters. Mr. Pride states:

> I don't take that, that Al was asking me to lie. But he certainly was trying to convince me that his efforts were legitimate.

Impeachment committee members questioned Mr. Pride on whether he thought Judge Hastings was trying to obtain his cooperation in presenting an alibi. Mr. Pride explained:

> [I]t didn't make me no difference in the car, I wanted him to understand, first of all, that if he did write them, he had no business writing them and if he did [not] write them and wanted to use them as an alibi, he couldn't count on me because I wasn't going to do that.

The other major witness, William Borders, refused to testify, not only at his own trial, when that was highly understandable as he had been caught with the money in hand, but long after his trial was over in other proceedings, resulting in his being jailed for contempt. Finally, his failure to testify before our Senate committee, though he was given immunity, also resulted in his imprisonment that continued until the end of these impeachment proceedings. William Borders refused to testify when, if honest testimony would have helped his friend, Judge Hastings would almost certainly have been exonerated. That honest testimony could have had no adverse consequences to Borders whatsoever, while his refusal to testify sent him back in jail. He is, of course, the only other person with firsthand knowledge of the key facts in this case.

I noted something else while Bill Borders was before the impeachment committee. Unlike the earlier proceedings, here, when Borders was called to testify, flanked by two lawyers, he asked the chairman, as we were going through the prescribed process which was inevitably leading to his going to jail, whether or not he could be permitted to make a statement. The chairman allowed him to make that statement. The statement was written in his own handwriting on lined legal length tablet paper. And unlike Judge Hasting's impassive answer when asked his opinion of Borders and what he had done to him, Bill Borders' statement was high with passion.

William Borders was bitter and angered at being in front of the impeachment committee. His frustration and his bitterness at having lost his career and his reputation were palpable and filled that room. And in the course of his statement, this man, who was a lawyer and a political figure and a former president of the National Bar Association, referred to his appearance before us as having been called as a witness for the prosecution.

> The committee has decided to call me even though they're allegedly not serving as a prosecutor but, rather, as the chief adjudicatory body. I had always thought that prosecution and judgment are two quite separate functions in the administration of any justice. Consequently, the two should not merge. Mr. Justice Frankfurter put the matter somewhat differently but toward the same point in *Johnson* v. *U.S.*, a 1948 case, wherein he declared that "there was no disputing the fact that counsel for each party are better able to determine the importance of witnesses, thus the natural result of preparation by both parties in the production by one side or the other of all vital witnesses." However, this committee has apparently sought to ignore such a natural course of events in favor and embrace of a marriage between prosecution and judgment.

Now, a moment's reflection would have established that he was not called by the impeachment committee as a witness for the prosecution. He was called by a group which was attempting to determine the truth. But in his frame of reference, he was called as a prosecution witness. Why did he feel that way? Because the truth was that he and the judge were both partners of this conspiracy to extort. William Borders' testimony could only further implicate Judge Hastings' involvement in this conspiracy scheme, as it did.

In my opinion, Bill Borders did, in fact, testify as eloquently as if he had answered the questions which we put to him that went unanswered. He had no motivation whatsoever for refusing to testify other than to protect his friend, the judge, which so far he had successfully accomplished.

Some attach a certain deficiency to this case because it rests on circumstantial evidence. There is nothing inherently more or less believable when a case is circumstantial, than there is when it is presented through direct evidence. Circumstantial evidence simply requires a determination about matters of fact.

More than 3,000 pages of testimony and 5,000 documents make up the record of this case. But as almost every other case, even one which took this long, the key facts are relatively few in number.

The House in its prosecution depended on six major incidents: First, the repeated, documented contacts between Borders and Judge Hastings at significant junctures of the *Romano* case; second, the detailed inside information about the events in the *Romano* case which Borders possessed and passed to Rico, a retired Federal Bureau of Investigations agent posing as Frank Romano—Rico/Romano—and Dredge, information which could only have come from Judge Hastings; third, Judge Hastings' appearance and conduct at the Fontainebleau Hotel on September 16; fourth, the "letters for Hemp" telephone conversation between Judge Hastings and Borders on October 5; fifth, the hurried issuance on October 6 of the order returning the Romanos' forfeited property, after months of inactivity in the *Romano* case, at a time shortly after Borders had promised that the order would issue; and sixth, Judge Hastings' flight on learning of Borders' arrest.

The first of these is the overwhelming coincidence of documented contacts between Judge Hastings and Bill Borders which always seemed to peak around proceedings in the *Romano* case in the judge's court room.

First, February 20, 1981, the *Romano* forfeiture hearing: Judge Hastings calls Borders at 7:30 a.m. in Washington, DC.

Second, March, Borders asks underworld figure and informant, William Dredge, about the Romanos' willingness to pay a bribe for Borders' help in their case before Judge Hastings.

Third, April 8, the *Romano* brief on forfeiture is submitted: Hastings calls Borders and leaves a message, and then calls again at 12:15 p.m. from a Miami courthouse pay phone to a pay phone in Washington, DC, charging it to his own home phone.

Fourth, May 4, the *Romano* forfeiture order is issued: Hasting calls Borders and leaves a message that it is "urgent"; the next day both Hastings and Borders are scheduled to leave at the same time from Miami to different destinations; this same day William Dredge calls Borders at Madeline Petty's at 12:07 a.m. May 7, Borders calls Dredge at 7:47 a.m.: Hastings leaves message for Borders at 4:30 p.m. May 10, Dredge is arrested: Borders calls Dredge.

Fifth, May 11, Hastings calls Borders' home at 6:27 a.m., then calls Borders at Petty's home at 6:28 a.m.; the *Romano* hearing is scheduled at 1 p.m. that afternoon and the forfeiture and sentencing is postponed.

Sixth, July 5, Dredge calls Borders at 6:36 p.m. and Hastings calls Borders at 8:53 p.m.; July 7, Hastings calls Borders at 11:56 a.m.; July 8, the *Romano* sentencing hearing results in both sentence and forfeiture.

Seventh, September 10, Dredge calls Borders at 1:29 p.m. about a meeting with Rico/Romano; Borders calls Hastings at 5:34 p.m. September 11, Hastings and Borders have the opportunity to meet at National Airport for 90 minutes. September 12, Rico/Romano meets Borders in Miami and Borders arranges for Hastings to be at the Fontainebleau on Wednesday the 16th at 8 p.m.; Borders meets Judge Hastings by showing up at the Sheraton Hotel in Washington, DC.

Eighth, September 16, dinner at the Fontainebleau Hotel; Hastings dines with Essie Thompson; Hastings supposedly looks for Borders to show at dinner; Borders is in Nevada at the Leonard/Hearns fight.

Ninth, September 19, Borders meets Rico/Romano who pays him a $25,000 down payment on the bribe. This meeting occurs in Miami at 10 a.m., and Borders tells Rico/Romano that the order will be issued in 10 days. October 2, Rico/Romano calls Borders at 3:11 p.m., asking "where's the order"; Borders calls Judge Hastings' chambers at 4:50 p.m. October 4, Rico calls Borders at 9:38 a.m.; Borders leaves message for Hastings at 4 p.m. October 5, Hastings tells his law clerk, Jeffrey Miller, to "finish the *Romano* order today"; Rico/Romano calls Borders at 4:22 p.m., Borders says that the order will go out "today or first thing in the morning"; Hastings calls Borders at 5:12 p.m., the "letters for Hemp" conversation.

Tenth, October 6, the *Romano* order is issued. October 7, Rico/Romano calls Borders who tells him that the order "went out yesterday."

This series of contacts is strong evidence, but I do not believe that it is clearly conclusive, taken alone. It could be a series of coincidences. Judge Hastings says that these contacts can be accounted for by National Bar Association activities, Hemphill Pride's release from prison and his efforts to regain admission to the bar, Borders' suit against President Reagan, and American Bar Association activities. I am unconvinced that these excuses explain away Judge Hastings incessant contacts with William Borders during this period, but I am not certain.

Next, the detailed knowledge William Borders had about the proceedings in the *Romano* case, without any identification that they came from anyone other than the judge himself, also constitute strong evidence, but I think not conclusive standing alone.

But then there is the incident at the Fontainebleau Hotel. This is where we get to that point at which each of us as human beings, whether a U.S. Senator, a lawyer, psychologist or whatever, has every bit as much ability to draw inferences as anyone else. On September 12, when Rico/Romano asked Borders for a "show of proof" to demonstrate that he really controlled the judge, Bill Borders instantly replied: Where and when do you want to see the judge? He did not check back and say we will try to do something tomorrow or anything of that sort. "Eight o'clock Wednesday evening at the Fontainebleau Hotel." And at 8 on Wednesday the judge and a date were at the Fontainebleau Hotel.

The judge told us he thought he would meet Bill Borders there. But if you were going to take a date and meet another friend with perhaps a date at the Fontainebleau Hotel, would you make a reservation for just two people? That is what Judge Hastings did. He made a reservation for two. And when he was seated at a table for four and the waiter took the other two place settings away, he said nothing. Would you say nothing, under those circumstances? He never told his date that they were meeting Borders and perhaps someone else there. Wouldn't you tell your date if you were metting someone else, under circumstances like that?

In addition, the Fontainebleau Hotel was not a regular dinner place for the judge. The excuses which the judge makes for that appearance just do not wash. Judge Hastings says that Borders had contacted him 2 days before the scheduled meeting to reiterate that he, Borders, would be there; that he—Hastings—made reservations for two because that is all "I was going to pay for"; that Borders had stood him up before; and that he did not know Borders was going to the fight in Las Vegas, though Borders was an avid fight fan. These excuses are not true. He was lying.

Further, the October, 5, 1981, recorded telephone conversation between Judge Hastings and Bill Borders deals with letters for Hemphill Pride that did not exist and contact with Hemphill Pride that did not take place.

Hemphill Pride did not want any such letters. To the contrary of Borders' statement in this telephone conversation, Hemphill Pride had not talked to Borders about the subject; and to the contrary of Judge Hastings' statement during the call, Mr. Pride did not talk to Judge Hastings about such letters that day or the next day or at any other time. Clearly, there were no communications on that subject between either of these conspirators and Hemphill Pride. This conversation is simply not about "letters for Hemp."

Finally, Judge Hastings abruptly left Washington, DC, after learning of Borders' arrest from Hemphill Pride: He failed to check out of his hotel or even to pick up his suit from the hotel cleaners; he took a $50 cab ride through Friday afternoon traffic to the Baltimore-Washington Airport [BWI], when he already had flight reservations at Washington National Airport; Judge Hastings flew to Fort Lauderdale as opposed to flying into Miami where his car was parked; and finally, switched from pay phone to pay phone at BWI, and requested one of those he was calling to do the same. Even so, standing alone, I would not take this panicked activity as anything near absolute proof of guilt.

But there is another inference, which individuals can and do take from the experiences of their lives every day. That inference is the relationship among a whole series of obviously related activities or actions. And, even though in isolation you might say that not one of these incidents would be sufficient for you to find guilt standing alone, they relate powerfully to one another. Two of them seem to me to be overwhelming, and several others simply add to the strength of those two, and, for that matter, to the others as well.

Obviously, I would have voted not guilty, if I were convinced simply that Bill Borders was engaged in rainmaking and name dropping without any knowledge on the part of the judge; all of us have been subject of name dropping.

Clearly, that is not the case, it seems to me, because in addition to the conspiracy that Borders entered with Rico/Romano, we have this long series of contacts between Bill Borders and Judge Hastings, including the telephone conversation to which I referred.

Many of us have questioned the wisdom of the FBI in not "letting the money run" or, in other words, seeing if the money went to Judge Hastings. We questioned whether the $125,000 could have been traced, although the original $25,000 downpayment was not traced. But we must deal with the evidence that we had, not what we would have liked to have had.

Finally, it has troubled me that, on the assumption that this conspiracy went on, why this judge would sell out for part of $150,000? That does not seem particularly rational.

There is an alternative explanation, though I believe that it is less likely than not. It seems to me at least conceivable that the judge, in his own mind, was not going to take any of this money, but was simply helping out a friend, and may very well have told Borders what he was going to do as far as court orders in the *Romano* case were concerned, and told him that if you can make some money out of that, fine, go ahead and do it; it was perfectly all right with the judge.

But even if one decides that that was the case, Judge Hastings is just as guilty as if he were going to take the $150,000 because he was a part of a conspiracy or a scheme to subvert the administration of justice. I myself do not think that is the case, but it is at least plausible that all of the money was going to stay with Borders.

I do not feel that it is possible to conclude that Judge Hastings did not know what was going on; that he did not go to the Fontainebleau Hotel in order to help Borders obtain the money; that the October 5 conversation was not on a subject other than Hemphill Pride, Under those circumstances, he is guilty as charged.

Even if one were to find that the two were working together, but that either they were working together only for the return of the forfeited goods or so that Borders, not Hastings, would get money, in my option, the judge would nevertheless be guilty of article XVII and several of the perjury articles, but not of article I.

With respect to article XVI, the wiretap article, my conclusion is that, in all probability, the judge did let slip the fact of that investigation, but that he did so indavertently or to be a "big" guy; he had nothing to gain; that no evil intention was present.

As a result, I determined long ago to vote not gulity on article XVI. But even if it was an inadvertent slip, in my opinion, it is still an appropriate gound for finding guilt on article XVII. That accumulative article, the thrust of which is that the judge engaged in activities which were inconsistent with remaining a Federal judge, the heart of this impeachment.

Based on the foregoing, I voted to impeach Judge Hastings from office on articles I, II, III, V, VII, VIII, IX, and XVII. I voted Judge Hastings not guilty on articles IV, VI, and XVI. The Senate did not vote on articles X to XV.

STATEMENT OF SENATOR BOB DOLE

[SEPTEMBER 24, 1989]

Mr. Dole. Mr. President, last week the Senate removed Alcee L. Hastings from his office as a Federal district court judge in the southern district of Florida.

I was one of the 69 Senators who voted to convict Hastings under article I of the Articles of Impeachment. I also voted to convict Hastings under articles II through IX and article XVII.

I voted to convict with great reluctance. I did not take my constitutional responsibilities lightly, and I know that my colleagues in the Senate did not take them lightly either. Alcee Hastings was not some apparition or figment of our collective imagination. He is a flesh-and-blood man—a man who stood before this Chamber to argue his case—and a man who has struggled for more than 9 years to salvage his professional and personal reputations.

WOULD WE VOTE TO CONFIRM HASTINGS TODAY?

But when all the legal arguments are peeled away, and when both sides have had an opportunity to present their views, it seems to me that a simple question remains: Would the Senate vote to confirm Alcee Hastings if he were nominated by the President today?

Indeed, would the Senate vote to confirm a man who has failed consistently over the years to exercise sound judgment? Would we confirm a man who so eagerly fled Washington, DC, soon after learning that his good friend William Borders had been arrested by the FBI? And would we confirm a man who was able to earn an acquittal during his criminal trial simply by lying under oath?

Mr. President, the answers to these questions are obvious.

Let's face it: If Alcee Hastings were nominated by the President today for a position on the Federal Bench, his nomination would be so riddled with question marks, so riddled with suspicion, that the chances are high that the nomination would not even reach the

Senate floor. The Senate Judiciary Committee would do the job for us.

THE PRINCIPLE OF "DOUBLE JEOPARDY" DOES NOT APPLY

In his defense, Alcee Hastings has repeatedly argued that he should not be tried for the same crime twice, that the principle of double jeopardy barred the impeachment proceedings brought against him by the House of Representatives.

Let's set the record straight once and for all: The principle of double jeopardy has absolutely no application here. It simply does not apply to an impeachment trial.

It is settled law that the double jeopardy clause of the Constitution applies only to criminal proceedings. But an impeachment trial is not, and was never intended to be, a criminal proceeding. It is essentially remedial in nature. This impeachment trial was not intended to punish Alcee Hastings, nor did it ever jeopardize his "life or limb." Instead, the impeachment trial's sole purpose was to determine whether Alcee Hastings should remain on the Federal bench.

Last March, the Senate rejected the double-jeopardy argument by an overwhelming majority of 92 to 1. So it was only appropriate for the Senate to reject this argument again when it came time to vote on the Articles of Impeachment.

THE QUESTION OF CIRCUMSTANTIAL EVIDENCE

Now, I'll admit that this case turned almost exclusively on circumstantial evidence. But this evidence is so overwhelming, it is so damning when taken together, that a guilty verdict is unavoidable. And a guilty verdict should satisfy any burden of proof, whether the burden of proof be "beyond a reasonable doubt," "clear, convincing, and unequivocal," or a "preponderance of the evidence."

We should not forget that Alcee Hastings' own peers, the Judicial Council of the Eleventh Circuit, spent more than 3 years investigating the bribery scheme. The Judicial Council's Investigating Committee called more than 100 witnesses. It issued a 381-page report. And the Judicial Council concluded that Alcee Hastings had indeed engaged in conduct that would constitute grounds for impeachment.

THE OBLIGATIONS OF FEDERAL JUDGES

Mr. President, article III of the Constitution gives to Federal judges the privilege of lifetime tenure. In their wisdom, the framers believed that lifetime tenure was absolutely essential to insulate the Federal judiciary from the normal pressures that flow from the political process.

But the privilege of lifetime tenure carries with it some very important obligations. Federal judges must adhere to the highest ethical and moral standards. And they must avoid even the slightest appearance of impropriety.

Mr. President, Alcee Hastings has failed to live up to these obligations, and he deserved to be removed from office.

A SPECIAL THANKS TO THE IMPEACHMENT COMMITTEE

Finally, I would like to thank Senators Bingaman, Specter, and the other members of the Impeachment Committee, for the fine work performed by the committee during the past few months. It was yeoman's duty—but a very important duty—and this Senator appreciates the service that the committee members have provided us all.

STATEMENT OF SENATOR BROCK ADAMS

Mr. ADAMS. Mr. President, impeachment is one of the Senate's most important powers, and one that must be exercised with the greatest sensitivity. In the Senate, impeachment is not a criminal proceeding. Instead, it involves removal from office, and potential humiliation, and lifelong damage to one's reputation.

The impeachment proceedings against Judge Alcee Hastings presented Senators with a very difficult decision. They involved very complex evidentiary conclusions drawn from circumstantial evidence. I personally spent several days listening to the presentation of the case and a number of nights examining the documentary evidence and reading the briefs. Judge Hastings also presented part of his argument and testified in his own behalf.

After reviewing the evidence and listening to the arguments, I have concluded that Judge Alcee Hastings was not guilty. The constitutional procedure governing impeachment and the rules established in this case by the Senate require each Senator to set his or her own standard of the evidence required to convict. I believe, that because of the special nature and implications of the Senate impeachment process, the standard for conviction should be clear and convincing, unequivocal evidence.

I realize that this is not the test of probable cause required in the House of Representatives to start impeachment procedures nor the test of beyond a reasonable doubt required by juries to convict in a criminal case. However, both the chairman and vice chairman of the Senate Committee, Senators Bingaman and Specter, indicated that they also believed the test for conviction should be clear, convincing and unequivocal evidence. I will also note that both the chairman and the vice chairman of the committee who heard all the evidence, voted that Alcee Hastings was not guilty and should not be impeached.

Judge Hastings' activities in the crucial period involved in this case appear innocent, but could also be consistent with a very clever conspiracy. The impeachment case involved allegations that the judge conspired to solicit a bribe from defendants in a criminal case before his court in return for mitigation of sentences and return of certain property. The judge's actions in court, however, regarding return of property were consistent with appellate decisions governing his court; and the judge never did anything to reduce the sentences of the defendants in question.

A Florida jury acquitted the judge on these charges of conspiracy using a test of guilty beyond a reasonable doubt. A judicial conference panel later reviewed the case and recommended impeachment proceedings be conducted by the Congress.

After my independent examination of the evidence and listening to the arguments of the various parties, I could not conclude that there was clear, convincing evidence that Judge Hastings was involved in a conspiracy. Frankly, the FBI broke the case before the sting money was distributed, and therefore we will never know whether the money was to remain with Mr. Borders or go to Judge Hastings or to someone else.

The background evidence in this case shows it started from information given to the FBI by an FBI informant, a former convicted felon named Dredge. Dredge had serious criminal charges pending against him and agreed to cooperate. He had conversations with William Borders, a former head of a National Bar Association, who was a Washington, DC, attorney and a friend of Judge Hastings. Mr. Borders has since been convicted on charges similar to those brought against Judge Hastings.

In this case, Mr. Borders undoubtedly did attempt to extort money from those he thought were defendants in a criminal case by contacting members of the Miami underworld and asking them if the defendants would pay to have their property returned and their sentences mitigated. The strange part of this case is that Mr. Borders never met the defendants or their representatives and apparently never discussed with Judge Hastings what the defendants looked like. The FBI substituted a sting operator named Rico—a former FBI agent—who gave money to Mr. Borders and acted the part of one of the defendants. All of the defendants are now dead and were unavailable to testify.

The case against Mr. Borders was very clear because Rico passed him $25,000 at one time and $125,000 at another time. Mr. Borders was convicted of his criminal activity, but the FBI arrested him before he had time to pass the money to anyone else. Therefore, the money was stopped before it could implicate anyone. Mr. Borders has refused to testify to anything concerning Judge Hastings and no money was ever traced to the judge. The judge testified he was innocent.

There was not a single government circumstantial charge in the case that was not disputed by the judge and therefore, the entire case rested on the inference or conclusion that one drew from what the judge did in his independent actions and what Mr. Borders did in his independent actions. In my mind, there was not clear and convincing evidence to support impeaching a judge with an unblemished record, who had served well, was regarded as an excellent, hard-working judge by his associates, and who had no direct involvement with the FBI informant, money or any other direct connection with Mr. Borders' illegal activities.

I do not believe there was clear and convincing evidence in this case to support this charge, and I voted to acquit.

STATEMENT OF SENATOR JOSEPH I. LIEBERMAN

Mr. Lieberman. Mr. President, I would like to explain why I voted to acquit Judge Alcee L. Hastings of each of the articles of impeachment brought against him by the House of Representatives. Before addressing these issues, however, I would like to thank the chairman and vice chairman of the Impeachment Trial

Committee for their fine and distinguished work in organizing and supervising the work of the committee and its staff. In addition, I also want to thank the committee staff, especially counsel Elaine Stone and Mark Klugheit, administrator Anthony Harvey, and Senate Legal Counsel Michael Davidson and his staff, as well as my counsel, John Nakahata and Aaron Bayer, for the assistance they have provided me throughout these proceedings.

Having had the opportunity to serve on the Impeachment Trial Committee on the articles of impeachment against Judge Hastings, I have come to appreciate the wisdom of placing the constitutional responsibility for adjudicating impeachments in the Senate. I hope the Senate will not consider further delegating, because of time pressures, its important role of deciding whether to remove Federal judges and officers. The Senate's responsibility is unique. In my view, it requires a duly constituted elected body such as this one to act as the public's representatives in judging whether an elected or appointed official should remain in office.

In deciding how to vote, I considered three questions: First, whether double jeopardy bars trial of Judge Hastings on the articles of impeachment; second, what standard of proof should be applied in order to vote to convict; and third, whether the House has met its burden of proof. For me, the standard of proof was dispositive. After listening to the evidence, I concluded that, had I been sitting on the jury at Judge Hastings' criminal trial, I could not have found him guilty beyond a reasonable doubt. But I also doubted Judge Hastings' version of the facts at several significant junctures. I cannot say, however, that the evidence clearly convinced me that Judge Hastings was guilty of the offenses alleged in the articles.

Because I believe conviction requires clear and convincing evidence of guilt, I voted not guilty on each article of impeachment. While I thought the quality of advocacy by the House of Representatives was outstanding, the quality of evidence was simply not sufficient for me to vote to remove Judge Hastings from office.

I. DOUBLE JEOPARDY

This past February, Judge Hastings moved to dismiss articles I through XV on grounds that the double jeopardy clause of the fifth amendment bars trial before the Senate on these articles. The Senate denied that motion by a vote of 93 to 1. That decision was amply grounded in constitutional history and law, as the Senate has argued in its brief filed in the U.S. Court of Appeals for the District of Columbia Circuit.[1]

On the issue of double jeopardy, I find it dispositive that impeachment is a unique constitutional process separate from the functions exercised by the executive and judicial branches. A criminal prosecution determines whether a defendant will be subject to criminal punishment for alleged misconduct, including deprivation of personal liberty or property, but cannot result in removal from Federal office. Conversely, in impeachment proceedings, we determine only whether the accused will be removed from office as a result of alleged misconduct and possibly be barred from holding future Federal office; we cannot impose fines or incarceration. (See J. Story, 2 "Commentaries on the Constitution," §§ 780-781 (1833).)

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[1] Brief of Appellees, *The Hon. Alcee L. Hastings v. United States Senate*, App. No. 89-5188, at 22-33 (D.C. Cir. filed Sept. 11, 1989) [hereafter "Sen. Br."].

Justice Story, in his *"Commentaries on the Constitution,"* noted the distinction between impeachment and judicial processes and concluded:

> There is wisdom, and second policy, and intrinsic justice in this separation of the offence, at least so far, as the jurisdiction and trial are concerned, into its proper elements, bringing the political part under the power of the political department of the government, and retaining the civil part for presentment and trial in the ordinary forum. Id. at § 784.

A consequence of this division of functions, however, is that a public official may be subject to trial twice, once in a court of law on criminal charges and once before the Senate upon an article of impeachment regarding his continuation in office. Thus, I do not find the double jeopardy clause bars trial by the Senate as a court of impeachment.

II. STANDARD OF PROOF

For me, a central question was and is what standard of proof should I apply? While "standard of proof" is a term of legal art, it is not merely a lifeless slogan or formula. The standard of proof is the way our Anglo-American system of jurisprudence has chosen to help juries and judges, and in this instance Senators, to do justice. Here, it disciplines each Senator by demanding a specific degree of certainty before voting for conviction, thereby assuring the respondent due process and freedom from undue speculation.[2]

Any discussion of standard proof presumes that each Senator will be weighing the evidence as a trier of fact would in our courts. This assumption itself is problematic since impeachment trials are only partially judicial in nature. As Alexander Hamilton wrote in the Federalist No. 65, impeachment trials "are of a nature which may with peculiar propriety be denominated political, as they relate to injuries done immediately to the society itself. The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties, more or less friendly or inimical, to the accused." The Federalist No. 65, at 331 (G. Wills, ed. 1982). Moreover, because our judgment here is not subject to review by the courts, if a Senator decides to vote to convict for ideological or political reasons, or because of some other factor unrelated to the allegations made and the evidence presented, he or she has the power to do so regardless of whether the evidence against the respondent is slight or overwhelming. The Constitution itself contains the only effective safeguard against such a politically motivated removal: it requires a majority vote of the House of Representatives to impeach and a two-thirds vote of the Senate to convict. But because I believe strongly that our proper role here is to act as a quasi-judicial trier of fact and law, and because I am aware that our decision in important cases implicates important public values, I find it necessary to determine the proper standard of proof to apply.

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[2] *See Addington v. Texas*, 441 U.S. 418, 423 (1979) ("The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'").

The Constitution and the rules of the Senate are silent on the standard of proof each Senator must apply. The Senate has previously considered this question on two occasions without enunciating a uniform standard. When impeachment proceedings against President Nixon were contemplated, Senator Mansfield proposed a rule, which was never adopted, requiring clear and convincing evidence for conviction. During our consideration of the articles of impeachment against Judge Harry. E. Claiborne, Judge Claiborne moved that the Senate designate "beyond a reasonable doubt"—the standard in criminal cases—as the standard of proof. The Senate rejected his proposal by a 17 to 75 vote. (132 Cong. Rec. S15507 (1986).) At that time, however, the Presiding Officer ruled each Senator remained free to apply any standard of proof, including a "beyond a reasonable doubt" standard. Thus, the Senate itself has not determined the proper standard of proof.[3]

Without benefits of precedent, the standard of proof must be determined by its function and purpose. Because it specifies the degree of certainty required to convict, the standard of proof allocates the risk of error between the officeholder and the public, which the Senate represents.[4] That allocation is best determined by weighing the interests affected by an impeachment trial and allocating the risk of error accordingly.

In deciding upon a standard of proof to apply, we therefore have to ask ourselves what values and principles are at stake and what relative weight we give to them. Clearly, one value is the honesty and integrity of the government. Also implicated are the independence of the judiciary, and the possible harm to the individual officeholder. And we must take care that the public, for whom we act as agents in this process, will view our actions as legitimate and not arbitrary. I will now examine each of these interests in more detail.

A. THE INTEGRITY OF THE JUDICIARY

The impeachment process was included in the Constitution "to provide a means 'for defending the Community.'" Sen. Br. at 23,

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[3] The history of impeachment proceedings in England prior to the nineteenth century also provides no guidance on what the standard of proof should be. Moreover, even if the House of Lords had articulated a standard of proof, such a standard would not necessarily be appropriate in the context of American impeachment trials. English and American impeachments carried very different consequences for the accused: "Unlike the practice in England, where impeachment was viewed as a criminal process resulting in the imposition of criminal, including capital, punishment, the Framers deliberately confined the consequences of impeachment "to a removal from and disqualification for office, thus limiting the punishment to such modes of redress as are peculiarly fit for a political tribunal to administer, and as will secure the public against political injuries." Sen. Br. at 24, *quoting*, 1 J. Story, *Commentaries on the Constitution*, §812, at 591 (5th ed. 1905).

[4] Each of the four common law standards of proof represents a different allocation of the risk of error: by the standard of "proof beyond a reasonable doubt," society "imposes almost the entire risk of error upon itself" (*Addington v. Texas*, 441 U.S. at 423); the standard of clear and convincing evidence allocates to society most, but not all, of the risk of error; under the preponderance of the evidence standard, society and the officeholder would share the risk of error almost equally; and a probable cause standard would assign most of the risk of error to the accused officeholder.

quoting M. Farrand, *The Records of the Federal Convention of 1787,* at 65 (rev. ed. 1966) (Madison). Impeachment is a "national inquest into the conduct of public men" and "the subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust." *The Federalist No. 65,* at 331 (Hamilton) (emphasis in original). And while the Constitution enumerates very few specific crimes warranting removal from office, bribery—which is at issue here—is one such offense.

The standard of proof we adopt must, therefore, protect and safeguard the public's interest in an honest government. Standing alone, honesty in government argues for a lower standard of proof, which is to say that any taint we see in a public official—if we are most interested in honesty in government—ought to lead us toward a conclusion that the official should be removed. A lower standard of proof reduces the risk that a corrupt officeholder will remain in office.

The other factors, however, suggest that a higher standard of proof would be appropriate.

B. INDEPENDENCE OF THE JUDICIARY

In a governmental structure as carefully balanced as our own, other governmental considerations are affected. We must be especially careful not to undermine judicial independence, which the Framers viewed as "essential" if the courts are to serve as "bulwarks of a limited constitution against legislative encroachments," and "to guard the constitution and the rights of individuals. * * *" The Federalist No. 78, at 397 (Hamilton).

The standard of proof will not, for reasons previously discussed, insulate a judge from a purely political attack by a majority of the House and two-thirds of the Senate. A higher standard of proof will, however, give an innocent judge some protection against evidence "trumped up" or otherwise marshalled in a politically motivated attempt to secure his or her removal. In this regard, I note that the House need not be the perpetrator of such a politically motivated attempt to remove a judge, as the evidence may be distorted or manipulated as early as the initial criminal investigation.

C. THE OFFICEHOLDER'S PRIVATE INTERESTS

In addition to the public interests to be safeguarded, the personal interests of the individual involved, while not conclusive, are also important. He or she has a right to due process. He or she has a right to be protected from public humiliation and, indeed, from the historic infamy to which he or she would be consigned by a conviction.

Although an accused Federal judge has some interest in retaining his or her life-tenured position, I do not believe that interest is of much weight here. Properly considered, life tenure appertains to the office, not to the person holding the office. The purpose of judicial life tenure is to ensure the "firmness and independence" of the judiciary. *See The Federalist No. 77,* at 393.

The accused judge's interest in his or her reputation is a much more substantial reason for applying a higher standard of proof.

Our courts, for example, judge criminal cases by a standard of beyond a reasonable doubt in part because of the stigma imparted by a conviction. *In re Winship,* 397 U.S. 358, 363 (1970). Similarly, civil cases involving fraud or other quasi-criminal wrongdoing frequently are judged by the clear and convincing standard to protect the accused's reputation. (*Addington* v. *Texas,* 441 U.S. 418, 424 (1979).)[5]

D. THE LEGITIMACY OF THE IMPEACHMENT PROCESS

The legitimacy of the impeachment process to the public we serve is another important value at stake here, and that to me also argues for a higher standard of proof. As the representatives of the people of our States, whatever we do here must be credible and fair to them. The public must perceive that we are not acting arbitrarily or improperly.

The Constitution itself, by requiring a majority vote of the House to impeach and a two-thirds vote of the Senate to convict, has in part addressed this need to give the impeachment process legitimacy. Congress can only remove a person from office where it has a substantial consensus.

In considering the legitimacy of our actions to the public at large, however, we also must be cognizant of the standards we use to govern ourselves. Both the Committee on Standards of Official Conduct of the House of Representatives and the Senate Select Committee on Ethics require proof by clear and convincing evidence before finding a violation of ethics rules by a Member of the House or Senate.[6]

It is not necessarily incongruous for us to apply a higher standard in disciplining Members of this body than in adjudicating impeachments. Unlike Federal judges, Members of the House and Senate face judgment by the electorate whenever they stand for election. Thus, if we fail to take disciplinary action because we apply a higher standard of proof, a Member's constituents can remove him or her and be free of corrupt or errant representation. Nevertheless, the appearance of arbitrariness that would result from applying a less exacting standard of proof for removing a judge from the bench than we demand for disciplining misconduct by our own colleagues strongly argues for use of the clear and convincing standard for adjudicating impeachments.

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[5] In both criminal and civil cases, a higher standard of proof is often also invoked where a judgment may adversely affect or burden a significant right. Thus, proof by clear and convincing evidence is needed to terminate parental rights (*Stantosky* v. *Kramer,* 455 U.S. 745 (1982)), to deport an alien (*Woodby* v. *INS,* 385 U.S. 276 (1966)), or to involuntarily commit a person in civil proceedings (*Addington* v. *Texas,* 441 U.S. 418 (1979)). These cases are distinguishable from impeachment because the judge in an impeachment proceeding has no personal right to hold office.

[6] Rule 16(e) of the Committee on Standards of Official Conduct of the House of Representatives ("At a disciplinary hearing the burden of proof rests on the staff with respect to each count to establish the facts alleged therein clearly and convincingly by the evidence that it introduced."); *Herman E. Talmadge Investigation: Report of the Senate Select Committee on Ethics,* S. Rep. No. 337, 96th Cong., 1st Sess. 84 (1979) (ruling, upon motion by respondent, that "the 'clear and convincing' standard is appropriate for weighing all the evidence which is introduced in the forthcoming hearings.").

E. THE EFFECT OF A PRIOR ACQUITTAL ON THE STANDARD

Judge Hastings, in his brief, urges that his prior acquittal requires application of a high standard of proof. Brief for Respondent Judge Alcee L. Hastings, at 4–5 [hereafter "Hastings Post-Trial Br."]. I do not believe this is true, either as a matter of law or policy. It is especially important to recall that criminal trials and the "National Inquest" of impeachment are separate processes that protect separate public interests. As I discussed previously, impeachment only addresses whether the officeholder has violated the public trust and is therefore unfit to continue in office.

As a matter of law, the prior verdict of not guilty establishes only that a jury found there was a reasonable doubt that Judge Hastings conspired to receive a bribe. The jury's verdict is not, however, an affirmative finding that Judge Hastings did not commit the acts alleged. I believe therefore that any Senate judgment is logically consistent with the jury's verdict unless the Senate finds Judge Hastings guilty on the bribery conspiracy charges beyond a reasonable doubt.

Deference by the Senate to the jury's verdict neither strengthens the jury system nor adequately protects the public interests safeguarded through impeachment. The jury verdict reminds us that Judge Hastings may be innocent, but it does not relieve us of our duty to examine the facts, weigh the evidence, and determine Judge Hastings' fitness to remain in office.

F. THE BALANCE OF INTERESTS

Upon weighing the competing interests and evaluating the relative severity of an erroneous outcome, I adopt for my own use the standard of clear and convincing evidence. The beyond a reasonable doubt standard fails sufficiently to recognize impeachment's purpose of defending the community against corrupt judges; it is too deferential to the judge. The probable cause standard fails to respect the potential for conviction of judges on "trumped-up" charges, society's interest in retaining skilled and honest jurists, and the damage to the innocent jurist's reputation wrought by an erroneous conviction.

On balance, the factors discussed above—protecting judicial independence, the judge's reputation, and the legitimacy of the impeachment process—lead me to choose the clear and convincing evidence standard over preponderance of the evidence. I am particularly troubled by the prospect of applying a lower standard of proof for the removal of a Federal judge than for disciplining a Member of the Senate. I do not believe the public would accept any reasons we proffered for doing so.

Several additional points bolster my decision to use the clear and convincing evidence standard. First, by requiring a two-thirds majority to convict, the framers evinced an intent that removal of a Federal officer through the impeachment process be difficult. Significantly, it shows that the framers did not view the need to protect the integrity of the judiciary as an interest so strong that it overwhelmed all other considerations.

In addition, the experience and judgment of the States in judicial disciplinary proceedings support application of the clear and convincing evidence standard. Most of the States, including my own State of Connecticut, conclude that the gravity of the matter and the severity of the impact upon the judge warrant application of the clear and convincing evidence standard. See Council on Probate Judicial Conduct re: Kinsella, 476 A.2d 1041, 1048 (Conn. 1984); In re Miera, 426 N.W.2d 850, 854 (Minn. 1988) ("the clear and convincing standard arises from an appreciation of the gravity of a disciplinary proceeding and the magnitude of the loss to which a disciplined judge is subjected").[7]

Finally, our courts have found the clear and convincing evidence standard appropriate in cases where factual findings implicate important constitutional values. In libel cases brought by public persons, for example, the courts require "clear and convincing proof" that a false statement was made knowingly or with reckless disregard for its truth. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). That standard proof is used to balance the first amendment's interest in a "vigorous debate on public issues" with protection of private individuals' reputations. *Hutchinson* v. *Proxmire*, 443 U.S. 111, 133–134 (1979). Here, I believe the clear and convincing evidence standard similarly would accommodate the framers' desire to maintain judicial independence while continuing to protect the public against corrupt officeholders.

On balance, therefore, conclude that we need to find the evidence against Judge Hastings to be clear and convincing in order to convict him.

III. THE ARTICLES OF IMPEACHMENT

Having selected the standard of proof, the next question is whether the House of Representatives presented clear and convincing evidence supporting any of the articles of impeachment. Although some of the evidence on the bribery conspiracy and false statement articles is troubling, I do not find the evidence to be clear and convincing.

With respect to all the articles, the evidence seems inconsistent with the line of Judge Hastings' life. Judge Hastings is a man born of modest means, who worked hard to get himself through college and law school. A community activist in every sense of the word, Judge Hastings was active in the National Bar Association, in his community in south Florida, and in politics and civic life. All the witnesses who testified to his judicial skills and his courtroom demeanor described him as an outstanding trial judge and a man of integrity. We must consider the articles of impeachment against this background.

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[7] *Also In re Hanson*, 532 P.2d 303, 307–308 (Alaska 1975); *McComb v. Commission on Judicial Performance*, 19 Cal.3d Supp. 1, 11, 564 P.2d 1, 6 (1977); *In re Jones*, 728 P.2d 311 (Colo. 1986); *In re Crowell*, 379 So.2d 107, 109 (Fla. 1979); *In re Rome*, 218 Kan. 198, 542 P.2d 676, 684 (1975); *Nicholson v. Judicial Retirement & Removal Commission*, 573 S.W.2d 642, 644 (Ky. 1978); *In re Daniels*, 340 So.2d 301, 306–307 (La. 1976); *In re Diener & Broccolino*, 268 Md. 659, 670, 304 A.2d 587 (1973), *cert. denied*, 415 U.S. 989 (1974); *In the Matter of Troy*, 364 Mass. 15, 306 N.E.2d 203, 235 (1973); *In re Nowell*, 293 N.C. 235, 247, 237 S.E.2d 246 (1977); *In the Matter of Field*, 281 Or. 623, 629, 576 P.2d 348 (1978); *Matter of Braig*, 520 Pa. 409, 554 A.2d 493, 495 (1989); *In re Friday*, 263 S.C. 156, 159, 208 S.E.2d 535 (1974); *Matter of Heuermann*, 90 S.D. 312, 317, 240 N.W.2d 603 (1976); *Matter of Deming*, 108 Wash.2d 82, 736 P.2d 639 (1987); *In re Pauley*, 314 S.E.2d 391, 399 (W.Va. 1983); *Matter of Johnson*, 568 P.2d 855, 865–866 (Wyo. 1977); *contra In re Walton*, 676 P.2d 1078, 1085 (questioning *Hanson*); *In re Terry*, 262 Ind. 667, 670–71 n.2, 323 N.E.2d 192, *cert. denied*, 423 U.S. 867 (1975) (preponderance); *Matter of Loyd*, 384 N.W.2d 9 (Mich. 1986) (preponderance); *Matter of Duncan*, 541 S.W.2d 564, 569 (Mo. 1976) (preponderance); *Matter of Seifert*, 491 N.Y.S.2d 145 (N.Y. 1985) (preponderance); *In re Brown*, 512 S.W.2d 317, 319–20 (Tex. 1974); *Matter of Corruzi*, 95 N.J. 557, 472 A.2d 546 (N.J. 1984) (beyond a reasonable doubt).

I will consider first those articles which I find to be insubstantial or without merit, including article XVI (disclosure of wiretap information), articles X through XIII (telephone calls to Pride), and article XIV (telephone calls from the L'Enfant Plaza Hotel). I will then turn to the more difficult articles which allege a bribery conspiracy (article I) and related false statement allegations (articles II–VII, XV), and fabrication of evidence (article IX).

ARTICLE XVI (DISCLOSURE OF WIRETAP INFORMATION)

In article XVI, the House of Representatives accuses Judge Hastings of disclosing information learned in the course of supervising a confidential wiretap to Stephen Clark, mayor of Dade County, an individual whose name had surfaced in those wiretaps. According to the House, while both were attending a breakfast meeting at which Judge Hastings was the keynote speaker and Mayor Clark received an award, Judge Hastings told Mayor Clark to "Stay away from Kevin Gordon, he's hot, he's been using your name in the Hialeah area." 2A Hearings Before the Senate Impeachment Trial Committee, S. Hearing No. 194, 101st Cong., 1st Sess., at 1123 (1989) [hereafter "*Hearings*"].

A significant problem for me with respect to article XVI was the lack of a sufficient motive for Judge Hastings to tell Mayor Clark to stay away from Kevin Gordon. There is no evidence that Judge Hastings and the mayor were close friends or political allies.

In addition, Mayor Clark's direct testimony that Judge Hastings told him to "stay away from Kevin Gordon" is undermined significantly by other evidence. While Mayor Clark testified that Judge Hastings revealed this information to him after Judge Hastings spoke that morning, the evidence showed that Judge Hastings left the auditorium by a rear entrance immediately following his speech in a manner in which he could not have spoken to Mayor Clark. Furthermore, the telephone call the House claims Mayor Clark made after Judge Hastings' alleged leak occurred at 8:58 a.m., before Judge Hastings' speech. Report of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, S. Rep. No. 146, 101st Cong., 1st Sess. 137 (1989) [hereafter "Report"].

Given the lack of a motive and the contradictory nature of the central evidence, I cannot conclude that the allegations in article XVI have been proven by clear and convincing evidence.

B. ARTICLES X THROUGH XIII (CALLS TO HEMPHILL PRIDE)

Articles X through XIII allege that Judge Hastings falsely testified during his trial that certain telephone records reflected calls from him to Hemphill Pride in South Carolina. The House contends that Judge Hastings made these false statements in a deliberate attempt to bolster his claim that his conversation of October 5, 1981 with William Borders was a conversation about providing assistance to Hemphill Pride. Post-Trial Memorandum of the House of Representatives, at 111 (filed Sep. 25, 1989) [hereafter "House Post-Trial Br."]. The House further contends that Judge

Hastings lied about these telephone calls to support his claims that the "letters for Hemp," which he introduced at his trial, were not fabricated, as the House contends. Id.

Regardless of whether Judge Hastings knowingly lied about the nature of these calls, they do not strike me as being impeachable offenses. I find these calls to be of little significance. In any event, I do not believe the evidence establishes that Judge Hastings knew at the time that his testimony was false. It is equally plausible that the judge erred in his testimony. Thus, had we voted on these articles, I would have voted to acquit.

C. ARTICLE XIV (CALLS ON OCTOBER 9, 1981)

Article XIV alleges that Judge Hastings falsely testified at his trial that on October 9, 1981, prior to his return to Ft. Lauderdale, FL, Judge Hastings called his mother and Patricia Williams from the L'Enfant Plaza Hotel in Washington, DC. Judge Hastings acknowledges that he may have been mistaken about the timing of his calls to his mother and Ms. Williams. 2B Hearing at 2353.

Even if Judge Hastings' testimony about these calls was factually untrue, I do not find his misstatements to be material. Although Judge Hastings testified both at his 1983 trial and before the committee that he returned home in part because he had spoken with his mother, who was hysterical, he also testified that he returned home at Hemphill Pride's suggestion in order to face any allegations on his home court. 2B Hearing at 2266. Pride, in his testimony, confirmed that he urged Judge Hastings to return to Florida before speaking with the FBI. 2A Hearing at 695. See also Report at 116–117.

Because I find Pride's testimony to be compelling, I do not believe Judge Hastings' case, either in 1983 or now, is strengthened by the alleged misstatements concerning the timing of his calls to his mother and Ms. Williams. Accordingly, I would have voted to acquit Judge Hastings on article XIV.

D. ARTICLES I–VIII, XV (BRIBERY CONSPIRACY)

Articles I through VIII and XV focus on the essential elements of the House's allegations that Judge Hastings participated in a conspiracy to receive a bribe. As outlined in these articles, the House alleges that from sometime in the first half of 1981, Judge Hastings and William Borders agreed that Borders would attempt to solicit a bribe from two defendants before Judge Hastings, Thomas, and Frank Romano. Articles I through II. On September 12, 1981, Borders met with an FBI agent, H. Paul Rico, who was posing as Frank Romano. At that meeting, Borders agreed that Judge Hastings would dine at the Fontainebleau Hotel on September 16, and that Rico would thereafter pay a $25,000 "down payment." The House contends Borders and Rico agreed that 10 days after Borders received the down payment, Judge Hastings would issue an order returning a substantial amount of property. Then, following payment of the balance of the $150,000 "bribe" and the filing of a motion by the Romanos to mitigate sentence, Judge Hastings was to reduce the Romanos' sentences to eliminate any time in jail. House Post-Trial Br. at 17; see articles III through IV.

Following that September 12 meeting, the House alleges that Borders returned to Washington, DC, according to a prearranged plan with Judge Hastings, in order to report to Judge Hastings on Border's meeting with Rico. See article VI. The House contends that Judge Hastings then dined at the Fountainebleau Hotel on September 16, 1981 in order to fulfill Border's promise to Rico that Judge Hastings would do so as a "show of proof." See article V. After Borders received the $25,000 "down payment," the House argues, Judge Hastings on October 5, 1981, ordered his law clerk to complete the order returning approximately $845,000 in previously forfeited property to the Romanos and, that same day, confirmed in a coded conversation with Borders the receipt of the down payment and the arrangements for Borders to obtain the balance from Rico. See articles VII through VIII.

The House further contends that on October 9, 1981, after Borders was arrested, Judge Hastings fled Washington, DC, by way of Baltimore-Washington International Airport in an effort to elude the FBI. See article XV. The House argues that Judge Hastings fled in order to have time to concoct a viable alibi, and that his flight therefore is strong evidence of guilt. House Post-Trial Br. at 87–88.

It is extremely difficult to evaluate the House's allegations. While there is much direct evidence of illicit activity by William Borders, there is little evidence to tie Judge Hastings to Borders' actions. I find much of the evidence of contacts or attempted contacts between Judge Hastings and Borders, especially those drawn from telephone records, to be inconclusive at best. The House's case must therefore stand or fall on the strength or weakness of its evidence on the few key events of September and October 1981 that directly involve actions by Judge Hastings.[8] I now turn to those significant events of September and October 1981.

1. THE DINNER AT THE SHERATON

In considering these allegations in light of the evidence, I immediately dispose of the House's allegation that Judge Hastings expected Borders to arrive at the Washington Sheraton on September 12, 1981, as a prearranged part of their alleged bribery scheme. See article VI. The committee heard from each of the people, other than Borders, who joined Judge Hastings for dinner that evening, and the testimony was contradictory as to whether they expected Borders to appear. Report, at 64–66. The most that can be established from the evidence is Borders had the opportunity to tell Judge Hastings that he needed to appear at the Fontainebleau Hotel on September 16. Judge Hastings admitted as much when he testified that Borders, in separate conversations on September 13 and 14, told Judge Hastings that he would be at the main dining room of the Fontainebleau Hotel in Miami Beach, FL, at 8 p.m. on September 16, 1981. Report, at 66.

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[8] Prior to September 1981, the only actions taken by Judge Hastings which the House alleges to be in furtherance of the conspiracy are the continuance of the Romano case on May 11, 1981, and the imposition on the Romanos of a substantial jail term at the July 8, 1981, sentencing. Because the continuance was requested by Neal Sonnett, counsel for the Romanos, and the jail term was requested by the prosecutor and was recommended in the pre-sentence report, those actions are not evidence that Judge Hastings was Borders' co-conspirator.

2. THE DINNER AT THE FONTAINEBLEAU HOTEL

This brings me to the first significant point in the House's account of Judge Hastings' alleged conspiracy with William Borders that actively involved Judge Hastings, the September 16, 1981 dinner at the Fontainebleau Hotel. Judge Hastings testified that he went to the Fontainebleau that evening expecting to meet Borders and to socialize with him, and not as part of a conspiracy. 2B Hearing at 2247. I found the evidence presented by the House to rebut this testimony, and Judge Hastings' apparent inability fully to reconcile that testimony with his actions that evening to be troubling. I cannot, however, conclude that the evidence presented by the House amounted to clear and convincing evidence that Judge Hastings dined at the Fontainebleau Hotel in furtherance of a conspiracy with William Borders.

The House contends that Judge Hastings' actions on September 16, 1981, belie his testimony that he expected to meet Borders at the Fontainebleau that evening. As the House points out, Judge Hastings took a date to dinner with him, he did not tell her that he was expecting to see Borders, he only made reservations for two for dinner, and he did not object when two place settings were removed. Moreover, he did not inquire after Borders at the hotel desk or attempt to have him paged. Report, at 67–68.

Judge Hastings' explanation of these facts was unconvincing. Before the committee, Judge Hastings stated that he made two reservations for dinner because he only expected to pay for two dinners, which frankly makes little sense. 2B Hearings, at 2248. His further explanation that he did not know whether Borders would eat because Borders had not eaten on some other occasions (2B Hearings, at 2464), and that he was doubtful Borders would appear because Borders had failed to show at a dinner in Washington, DC in July 1981 (Hastings Post-Trial Br., appendix C at 95) are less than persuasive. The explanation offered by his counsel at final argument and in appendix C to his brief—that he did not tell his date about possibly meeting Borders or object to the removal of the place settings, or make a more concerted effort to find Borders because Judge Hastings did not want to be embarrassed in front of Ms. Thompson—while plausible, lacks any support in Judge Hastings' own testimony.

Judge Hastings testified, on the other hand, that he told the maitre d' and hostess he was waiting for Borders, although Essie Thompson, his date, did not overhear such a conversation. The House does not dispute Ms. Thompson's testimony that, after the Judge Hastings got up and walked around the restaurant and into an adjacent lounge, he told her that he had been looking for some friends from Washington, DC. 2A Hearings at 521.

I cannot find the evidence concerning Judge Hastings' dinner at the Fontainebleau Hotel to be clear and convincing proof of his participation in the alleged conspiracy with Borders. While this showing might be clear and convincing if accompanied by other strong evidence of a bribery conspiracy, as presented here it does not reach that threshold.

3. THE OCTOBER 5 HASTINGS/BORDERS TELEPHONE CALL

The next significant step in the House's chronology of the alleged conspiracy was Judge Hastings' order to his law clerk on October 5, 1981, and his allegedly coded telephone conversation with William Borders. Standing alone, the order to the law clerk to complete the forfeiture order in United States versus Romano seems unremarkable, especially in light of the undisputed fact that Jeffrey Miller was due to leave Judge Hastings' employ within the month. The October 5 instruction by extent that it serves to bolster other, stronger evidence of a conspiracy.

The October 5 conversation between Judge Hastings and William Borders is stronger evidence if one accepts the House's view that this conversation was a coded discussion of the bribery conspiracy. Here again, while I find aspects of Judge Hastings' explanations of this conversation troubling, I do not believe the House has demonstrated by clear and convincing evidence that this conversation was part of the alleged conspiracy.

What is troubling is that the House's explanation of that conversation, which is reprinted in full on page 83 of the committee's report, dovetails with the general outline of events as they unfolded in the undercover bribery investigation. Considering only the language of the conversation, it is plausible that, as the House contends, when Judge Hastings told Borders, "I've drafted those ah, ah, letters, ah, for Hemp," he was referring to the forefeiture order in the *Romano* case that he had ordered his law clerk to finish preparing. It is also plausible that when Judge Hastings, asked Borders, "did you hear * * * from him after we talked?" he was inquiring about the status of Borders' dealings with Rico, and that Borders' response "I talked to him and he, he wrote some things down for me. * * * And then I was supposed to go back and get some more things" could refer to Borders' receipt of the down payment from Rico and his plan to collect the remainder of the bribe following issuance of the Romano forfeiture order. Pride's testimony that he did not recall discussing his financial condition with Borders when he and Borders met in a coffee shop in Washington, DC in early September 1981 (2A Hearings, at 732–733), and that he did not write anything down for Borders, lends support to this interpretation of the October 5 conversation.

Judge Hastings' own explanation of this conversation in some ways undermines his explanation that this simply was a conversation about letters of support for Hemphill Pride. It stretches the imagination to believe, as Judge Hastings testified, that Borders was prodding him in almost every conversation to write letters soliciting support and money for Hemphill Pride from March 1981, and especially after July 1981, until October 1981. Moreover, Judge Hastings is hurt by his own inability to tell the committee what "financial information" Borders was to gather from Pride, by his admission, that, at the time of that conversation he did not know Pride had judgments levied against him (2B Hearings at 2420, 2474–75), and by his failure to seek from Borders, during the conversation, the preliminary results of Borders' initial discussion with Pride (id. at 2428–29, 2490). Judge Hastings' answer that this was a common subject of conversation between Borders and himself (id. at 2490) is hard to square with these facts.

Thus, I am again left with doubts about Hastings, explanation to the committee. Several factors, however, prevent me from moving from this concern to a finding by clear and convincing evidence that the October 5 conversation was a coded conversation about the alleged bribery scheme. First, the House relied heavily upon the expert testimony of a linguist, Dr. Robert Shuy, to establish that the October 5 conversation was coded. I found Dr. Shuy's testimony to be unpersuasive and not generally scientifically recognized.

Second, the time of the October 5 conversation is not consistent with the conspiracy as alleged by the House. Borders received the $25,000 down payment from Rico on September 19. On September 20 or 21, Judge Hastings and Borders spoke by telephone. Report, at 77. If Judge Hastings and Borders were conspirators, they presumably would have discussed receipt of the down payment at that time. There would have been no need for Judge Hastings to reconfirm Borders' receipt of the down payment during the October 5 telephone conversation.

The House also fails to provide a coherent explanation for Borders' failure to attempt to contact Judge Hastings between September 20 or 21 and, at earliest, October 2, 1981. The House further leaves unaddressed Judge Hastings' failure to issue the Romano forfeiture order within 10 days of Borders' receipt of the down payment on September 19. September 29 came and went without the judge issuing the order and without any calls by Borders inquiring about why Judge Hastings was delaying the issuance of the order. These are, as Judge Hastings points out, significant gaps in the House's account of events.

Also lacking is a clear motive for Judge Hastings to conspire with Borders. As previously discussed, Judge Hastings was by all accounts a man of integrity. Even the FBI, at the time it investigated the bribery allegations, concluded that Judge Hastings lived within his means as a Federal judge. There was no testimony that Judge Hastings had a gambling or drug problem. According to the line of his life, Judge Hastings was not a man for whom money seemed extremely important.

Finally, it seems relevant that Judge Hastings' actions in the *Romano* case were consistent with the law at that time. The House concedes that the order issued in the *Romano* case on October 6, 1981, returning forfeited property was compelled both by the Fifth Circuit's decision in *U.S.* v. *Martino*, and by its later decision in *U.S.* v. *Peacock*. The fact that Judge Hastings may initially have been disinclined to follow Martino, does not make his decision to follow Martino in the wake of Peacock suspect.

In light of the inconsistency of this evidence, despite the fact that Judge Hastings' explanations trouble me, I cannot find clear and convincing evidence that the October 5, 1981, conversation between Judge Hastings and William Borders was a coded conversation concerning the alleged bribery conspiracy.

4. "FLIGHT"

The final step in the House's chronology of the alleged conspiracy is Judge Hastings' alleged flight from Washington, DC, to Fort Lauderdale, FL, on October 9, 1981. Without a doubt, it is suspicious.

Judge Hastings addresses this issue in two ways. He admits he panicked. This panic, Judge Hastings contends, did not result from a guilty conscience, but from his experiences with the FBI while a practicing attorney and from, to put it frankly and in a way Judge Hastings deliberately avoided, his experience and perspective as a black man. I find his explanations to be plausible.

Moreover, Hemphill Pride's testimony that he advised Judge Hastings to return to Florida to get a home court advantage in facing the allegations of bribery, provides a sufficient explanation of the judge's conduct. In light of this evidence, I cannot conclude that the judge's flight from Washington, DC, is a clear indication of his guilt.

5. CONCLUSION ON THE BRIBERY CONSPIRACY AND RELATED FALSE STATEMENT ARTICLES

Upon consideration of all the evidence on articles I through VIII, and XV, I cannot conclude the House has shown by clear and convincing evidence that Judge Hastings participated in a conspiracy with William Borders to solicit a bribe from Thomas and Frank Romano, as alleged in article I. I also cannot conclude, based on clear and convincing evidence, that Judge Hastings committed perjury during his 1983 criminal trial, as alleged in articles II through VIII and XV. Accordingly, I voted to acquit Judge Hastings on each of articles I through VIII, and I would have voted to acquit him of article XV.

E. ARTICLE IX (FABRICATION OF EVIDENCE)

Article IX alleges that Judge Hastings fabricated the draft "letters for Hemp" that he introduced at his criminal trial, and that he perjured himself when he testified in 1983 that those drafts were authentic. Again, while I was disturbed by some of Judge Hastings' testimony, I cannot find clear and convincing evidence of guilt.

Judge Hastings attempted to explain the chain of custody of these letters. On direct examination, Judge Hastings testified that he kept these letters in his desk drawer until he put them in the safe of one of his attorneys, Andrew Mavrides. Before producing the letters in November or December 1982, Judge Hastings testified that he retrieved them from Mavrides' safe and gave them to Jeanette Montee, who ultimately produced them to the Government. 2B Hearings, at 2309–10.

After he testified that he showed the letters to Borders' attorney John Shorter, Judge Hastings then explained that he had gotten the letters from Mavrides in order to show them to Shorter, and that he subsequently returned them to Mavrides. Id. at 2481–82. Judge Hastings did not have a distinct memory of returning the letters to Mavrides, and did not testify as to the details of how he obtained the letters to show them to Shorter, and returned them to Mavrides. Id. at 2482, 2487–88.

Judge Hastings' unspecific and somewhat changing recollection of the chain of custody of the letters was not completely credible. On the other hand, I found no basis in the evidence to be sufficiently certain that he did not draft the letters on or about October 5, 1981 to find him guilty of article IX by clear and convincing evidence. Forensic tests failed to confirm or deny the authenticity of these drafts. The failure of the House's proof on articles I through VIII and XV also undermines greatly the strength of the "chain of custody" evidence alone. In the absence of stronger evidence that these letters were not drafted on or about October 5, 1981, I voted to acquit on this article.

IV. CONCLUSION

For the reasons stated, I voted to acquit Judge Hastings of all the Articles of Impeachment which were put to a vote of the Senate, and I would have voted to acquit him of all other articles.

Do I worry that I have made a mistake and may have voted to leave a guilty man on the bench? The evidence is too uncertain to feel otherwise. But I would rather assume the risk of being incorrect than the risk that I will unfairly and unjustifiably remove this man from the judiciary, ruining his reputation, consigning him to historic infamy, and making him only the sixth Federal judge in more than 200 years of American history to be convicted by the Senate of an Article of Impeachment. I am more comfortable risking error because of the unrebutted testimony of Judge Hastings' outstanding performance on the bench.

I worry also that if I apply a lower standard of proof, such as preponderance of the evidence, I could set a precedent that would allow future judges to be removed for political or ideological reasons and jeopardize the independence of the judiciary and the legitimacy of the impeachment process.

Because I know that some will question the good faith of the Senate's vote to remove Judge Hastings, I wish to make clear that my disagreement with the Senate's action does not mean that I believe there has been a miscarriage of justice. The chairman and vice chairman conducted the committee's proceedings in an extraordinarily fair manner and all the members of the committee discharged their responsibilities fairly, impartially, and conscientiously. The Senate's closed deliberations were among the most thoughtful and impressive moments of this my first year in the Senate. I was struck by the quality of the debate and the fairness and seriousness of purpose exhibited by my colleagues. Put simply, this is a case upon which reasonable men and women can and did differ.

STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

Mr. BIDEN. The House of Representatives argued that former Judge Alcee Hastings should be impeached because, while serving as a judge on the U.S. District Court for the Southern District of Florida, he:

First, engaged in a bribery conspiracy;

Second, lied about the conspiracy at his jury trial to gain an acquittal;

Third, improperly disclosed confidential information that he learned in his official capacity as a Federal district court judge; and

Fourth, undermined the integrity of the judiciary and betrayed the trust of the American people.

The House of Representatives exhibited 17 articles of impeachment.

ARTICLE I

The House charged that in 1981 former Judge Hastings engaged in a corrupt conspiracy with attorney William A. Borders, Jr., to obtain $150,000 from two brothers, Tom and Frank Romano, in return for eliminating jail sentences that Judge Hastings had imposed after the Romanos were convicted of racketeering offenses.

ARTICLES II THROUGH XV

The House charged that in securing his acquittal by a jury on the bribery conspiracy charge, in 1983, former Judge Hastings lied repeatedly under oath and submitted false evidence.

ARTICLE XVI

The House charged that former Judge Hastings, while acting as the supervising judge of a wiretap, revealed highly confidential information that he learned as a result of that wiretap.

ARTICLE XVII

The House charged that, by virtue of all the foregoing alleged acts of misconduct, former Judge Hastings undermined confidence in the integrity and impartiality of the judiciary and betrayed the trust of the people of the United States.

STANDARD OF PROOF

The Senate previously decided not to establish the standard of proof that should be used in impeachment trials, and it did not make a determination for former Judge Hastings' impeachment trial. Each Senator must decide individually what standard of proof is appropriate.

The Constitution does not mandate a required standard of proof for impeachment trials. During the impeachment of former Judge Claiborne, the Senate rejected Judge Claiborne's motion to establish "beyond a reasonable doubt" as the appropriate standard of proof in impeachment trials. At the time, however, it was clear that individual Senators could decide that beyond a reasonable doubt was an appropriate standard of proof.

I decided that the appropriate standard of proof in this impeachment trial was the beyond a reasonable doubt standard, even through the Constitution does not require that Senators use this standard. Former Judge Hastings was acquitted by a unanimous jury verdict of the bribery conspiracy charge. The jury heard essentially the same evidence presented to the Senate. It observed the witness and weighed each side's presentation of the evidence when deciding to acquit Judge Hastings. That jury verdict should have been considered by the Senate. I believe that deference to the jury verdict required proof beyond a reasonable doubt.

EVIDENCE

I voted not guilty on articles I through IX and article XVI because the circumstantial facts were not marshaled to prove guilt beyond a reasonable doubt. Doubts about the key elements of the House's case remain. For example, if former Judge Hastings was a participant in the bribery conspiracy, why did he issue the forefeiture order several days after Mr. Borders promised it would be issued.

During the debate, a few of my colleagues made conclusory arguments advocating former Judge Hastings' guilt in response to my inquiry about what, if any, new evidence had been discovered after the jury trial. I was concerned about a few of my colleagues' reliance on the findings of the Judicial Conference and the Judicial Council of the Eleventh Circuit that former Judge Hastings was guilty of the misconduct alleged in the impeachment articles, when it appears that they did not have any new evidence that was not before the jury. More importantly, Senators should make their own decision in impeachment trials based on the all evidence before the Senate, not based solely on the determination of guilt or innocence by another group or government body.

ARTICLE XVII

I voted to acquit on article XVII because the appropriate reading of this article required a finding that Judge Hastings committed all four alleged acts of misconduct, in order to vote guilty. The facts were not marshaled to prove that former Judge Hastings committed all four acts of misconduct.

STATEMENT OF SENATOR DAVE DURENBERGER

Mr. DURENBERGER. Mr. President, the U.S. Senate has been called upon to perform its most difficult constitutional duty: To vote on the Articles of Impeachment for U.S. District Court Judge Alcee L. Hastings.

Before I begin, I want to thank the minority leader and my colleagues for the opportunity to serve on the special committee. The special committee membership was very impressive, with six or eight of the Nation's most esteemed prosecutors, U.S. district attorneys, and small-town prosecutors. While I have a law degree and practiced a little courtroom law, these colleagues helped me a great deal to understand and add definition to this complicated case. None of us who served on the committee looked forward to the task. We all had some idea how difficult the case was and how difficult a 4-week trial would be in the middle of a very tough legislative session. And, Mr. President, Senators Bingaman and Specter deserve special praise for their leadership and commitment. They held the committee together and made the proceedings fair to all involved.

But, despite the impressive committee, in the end, for the first time in my life I had to be a juror; somebody who had to sit and listen to a lot of very, very difficult facts over a 4-week period of time, and come to a verdict. It was not easy, and for that reason, I am glad I am not one of the 88 Members of the Senate who did not serve on the special committee because of numerous troublesome factors involved with this case. One reason is the circumstantial nature of the evidence. Although there are hard facts, they are not the kind where you can say "I will take that one, it settles the case for me beyond a reasonable doubt."

Another reason is the incredible length of time from the events in 1981 and today at the end of 1989 when the Senate is to decide. This time lag means that certain evidence was unavailable to both sides. Evidence could not be produced no matter how hard you try to produce it. Thus, we have to agonize over gaps in the evidence.

As Senators mull over the case, some implication will be drawn form the failure of the alleged cosponsor, William Borders, to testify. And, Mr. President, I did draw some implication from the fact that William Borders is sitting in jail today because he is unwilling to testify in a case in which his testimony is critical. The failure of the FBI to allow the case to move from circumstantial to hard evidence is also troubling. The FBI could have made the decision to let the money run and see if it ended up in the hands of Judge Hastings, and that would have made the case much simpler.

Regarding Judge Hastings, if my collegues had sat through the hearings, they would have been impressed by this man and by both his local and national reputation. This forced me to ask why in the world would he do what he is alleged to have done. I do not know how many times all of us have asked ourselves this question. Then there is Hemphill Pride. He gave compelling testimony—for both sides—and is the only person who had no reason to lie. Thus, should I as a juror put extra amount of weight on this one almost incredible man, who had been a very, very close friend to both Judge Hastings and Bill Borders?

But, Mr. President, the biggest problem is that there is no instruction on the burden of proof. There is no judge to sit at the end of all this and say here is what you have to find before you make your decision. So every Senator is on their own to not only sift the facts and their different explanations, but to determine what weight they give those facts and explanations. And the Senate doesn't even have the recommendation of the committee, as it has with legislation. That was not the special committee's role; the Founding Fathers left the burden of impeachment to the conscience of Senators.

In the hearing I made the decision not to reach a decision regarding Judge Hastings' guilt or innocence until the final oral arguments were made on the Senate floor. And it was a very difficult decision that I finally reached, very difficult. It was the most difficult of the two decisions I could have made: I decided to vote to impeach Judge Alcee L. Hastings on several but not all of the Articles of Impeachment.

Admittedly, at the outset, there was a point at which I felt that acquittal by a jury in this case was compelling evidence which I needed to consider. But, the responsibility that a Member of the

U.S. Senate brings to an impeachment differs from the responsibility of an ordinary juror. As we perform our duty, we must not only execute our constitutional obligations, but we must keep a wary eye on public interest. The House of Representatives and Judge Hastings urge us to balance our trust and confidence in the judiciary against the rights of one judge.

As I have indicated, in making my decision, the greatest difficulty lay in determining the burden of proof. While a normal juror is comforted by the judge's instructions, here we have no judge and we have no instructions. We are left to our conscience. Alone, each of us must come to our own judgment on this subject. My judgment is that I must be convinced by the evidence brought during the Senate trial. In addition, I gave merit to the decisions rendered by my colleagues in both bodies and by the investigating committee of the Federal Judicial Council. The Council was comprised of persons with considerably more experience in these matters than I. Had I been able to reach an easier conclusion in this case, or had I gone away from the 4 weeks of trial with a clear conviction as to Judge Hastings' innocence or guilt, I would not have considered the past deliberations. However, that is not the case and therefore I am compelled to look to the conclusions of others, including the Judicial Council, for assistance.

In my 11 years in the Senate we have not had an impeachment as difficult as this. There are many disturbing facets to this case. They include:

First, the circumstantial nature of the evidence;

Second, the incredible length of time between the alleged wrongdoing and now, which resulted in lost of unavailable evidence and witnesses; third, William Border's unwillingness to testify; fourth, the failure of the FBI to allow the case to move from circumstantial to hard evidence by arresting Borders at the point he was paid off; fifth, the character and reputation of Judge Hastings which was uncontroverted by witnesses; sixth, the failure to identify a clear motive for Judge Hastings to be involved in the Borders conspiracy; seventh, the impressive testimony of Hempill Pride; eighth, Judge Hastings' plausible explanations for each of the circumstances on which the House argued he should be convicted; ninth, the failure to have a burden of proof instruction.

However, as I sorted through the facts and assessed the evidence, I was able to reach certain conclusions:

First, Judge Hastings' explanation of the events contain a flaw. A key part of Judge Hastings' defense was his desire to help Hemphill Pride. According to Judge Hastings, "the biggest topic that Borders and I were talking about at this time—in late April and early May—was helping Hemphill Pride * * * and that's when Pride was pressuring me." How can the aid being planned by Borders and Hastings possibly go on for 5 months in a relationship that's as close as theirs with the benefitting party—Pride—not being aware of or desiring such treatment? The judge used this assistance of Pride to explain not only the letters to Borders, but many of the telephone conversations and other contacts that he had with him. All of which took place during the course of the summer and fall. Yet, in his testimony, Hemphill Pride clearly states that he was pressing neither of his friends for letters to reinstate him to the South Carolina bar. Separately, I have determined that of all the people in this case, Pride has no reason to do anything but be as truthful as his conscience and instincts permit.

This disturbing evidence leads me to believe that when forced to chose between the House's explanation for the evidence and Judge Hastings', I must agree with my colleagues and will therefore vote "guilty" on impeachment articles I and XVIII.

Second, although much has been made of the so-called letters for Hemp, the conversation between Borders and Hastings is not critical to my decision. Their personal friendship and ability to communicate by a variety of means indicates to me that if in fact Rico and Borders cut a deal at the Miami, Airport on Saturday morning, September 12, that to the degree that Judge Hastings was an essential part on delivering on that deal, his role would have been communicated to him by Borders prior to the 5:12 phone call on October 5. Therefore, I find it difficult to come to judgment on the purpose of that call or its meaning and will consequently vote "not guilty" to article VIII.

Third, regarding the letters themselves, Judge Hastings claims to have drafted them on the bench during the course of a trial on October 5. My colleagues in the House were unable to prove that they were anything other than what Judge Hastings purported them to be and for this reason I will vote "not guilty" to article IX.

Nonetheless, the letters to Hemphill do trouble me. Hastings suggested that his secretary was gone when he came off the bench with the letters so he stuck them in his desk drawer. I can't believe that in light of the other things he managed to get done—the phone calls and the orders to produce the Romano order—that he never got them typed and sent as he said he would in the "coded" conversation.

Fourth, with regard to the September 16 dinner at the Fontainebleau Hotel, common sense, experience, and even the argument made by Judge Hastings and his counsel, would lead one to believe that a friend as close as Hastings would have known that Borders would be in Las Vegas that evening, not at the Fontainebleau. Borders made no effort to keep his trip secret to others. For that reason, I have concluded that any testimony of Judge Hastings with regard to the Fontainebleau is contrived and will vote "guilty" on article V.

Fifth, regarding article VII and the issuance of the order, I am convinced that Judge Hastings ordered Jeffery Miller to get the order out as his part of the conspiracy. Counsel for Judge Hastings argues that bribery was contingent on the performance of two acts: First, the appearance of the judge at the Fontainebleau—which has already been addressed; and second, the issuance of the order returning the forfeited property. While the issuance of the order did not occur within the 10 days Borders predicted, it was issued after several repeated attempts by Borders to talk to Hastings.

The issuance of the order was also unusual. It was rare for Judge Hastings to demand his clerks to draft orders immediately, even when they were over due. In addition, this order was sent special delivery Thus, Borders' prediction, when combined with his repeated attempts to contact Hastings which appeared to grow increasingly urgent as the order becomes more overdue, and the judge's unusual actions to finally get the order out, led me to believe that its issuance was part of the conspiracy. Therefore, I will vote "guilty" on article VII.

Sixth, I am bothered by Hastings' reaction to the news that he received in the early afternoon of October 9 from Hemphill Pride. Pride told Hastings that Borders had been arrested and that the arrest was pertaining to "something that took place in your courtroom." Hastings did not ask Pride for any details; instead, his first reaction was to ask how the potential media attention would affect his mother. While this is an admirable thought, one cannot help but think that Hastings would have asked for some detail, that is unless he knew already why Borders was arrested. He had various sources he could have turned to—Borders, Borders' attorney John Shorter, or Ken Mundy—before leaving town. Yet he did not try to get any details. He simply fled to Florida. The record shows that he did not talk to any potential sources of information before he visited with his mother, Pat Williams, and the FBI.

Arguably, there is another way to look at this. Hastings said that it was immediately clear to him during his FBI interview that "I was not a witness, I was a target." That's why he refused to take a polygraph. If that were true, that it only came to him at this point, in the middle of the night, that he was a target not a witness, why was he concerned for his mother while he was still at L'Enfant Plaza and why was he also concerned that the FBI might be listening to his telephone conversations with either his mother or Patricia Williams? Furthermore, why would he use a payphone that was impossible to tap and take a $50 cab ride to BWI? Hastings claimed that the Florida reporters had gotten to his mother and scared her. He could only have learned that by calling his mother which he did not do until arriving at BWI. The House reported that journalists signed in at his mother's compound on October 9, but not until 8 p.m. Consequently, they were not there in the afternoon when Hastings claims they were.

There is one other peculiarity that I take note of regarding the events at L'Enfant Plaza. On October 9, when Pride discovered that Borders was arrested by the FBI and that his friend Alcee Hastings may have been involved, his advice to Hastings was to go home and face the music on his own court. From then on, all the evidence indicates that Pride was suspicious of both Borders and Hastings and their requests of him to play a part in their exoneration. Pride's testimony before us left no doubt in my mind that he continues to harbor these same suspicions.

For all the aforementioned reasons, I will vote "guilty" on article XV as well.

Finally, Mr. President, while I have developed a great admiration and affection for Judge Hastings as well as his counsel, every time I ponder the mountains of evidence, albeit their characterization as circumstantial, it becomes more difficult to reach a conclusion different from that reached by the Federal Judicial Council and its investigating committee. That was a true jury of his peers and I have no doubt that they used a standard that they would want used against themselves. It is the same conclusion arrived at by every member of the House investigating committee, chaired by John Conyers, and the House itself.

Regarding the other Articles of Impeachment, the articles regarding Hastings' phone calls to Hemphill Pride in South Carolina, articles X to XIII, and article XIV, I accept Judge Hastings' declaration that these statements were good faith mistakes. Also given the fact that they are immaterial to the case, I will vote "not guilty" on these articles.

In addition, I feel the House has not carried its burden regarding article XVI, dealing with the disclosure of confidential wiretap information. While I accept the fact that if Judge Hastings did in fact make such a disclosure it would be an impeachable offense, I am not convinced that he did so. Therefore, I will vote "not guilty" on article XVI.

In conclusion, Mr. President, as I searched my soul and attempted to reach my decision, I have repeatedly asked whether a higher standard of ethics applies to elected officials or American citizens than applies to a lifetime appointment to the Federal judiciary? I continually ask myself whether this is an issue of ethics or morality? While I have not reached a satisfactory conclusion of these questions in my own mind, I have carefully weighed the evidence, and although it is extraordinarily complex and partially based on circumstantial evidence, I have reached the very unpleasant conclusion that Judge Alcee L. Hastings participated in a criminal conspiracy to solicit a bribe and that he is therefore unfit to continue to serve as a U.S. district judge and must be impeached.

STATEMENT OF SENATOR ALAN K. SIMPSON

Mr. SIMPSON. Mr. President, at the outset, I want to thoroughly commend my colleagues for the outstanding service they rendered on this Senate Impeachment Trial Committee. I am pleased you did it. I do not believe I would have had the patience to do it. I am relieved that the leader did not put me on the committee. The last good deal I received like that was when our leader, Howard Baker, placed me on the Select Commission on Immigration and Refugee Policy. I would not want one like that again. But you fine colleagues did a great deal of tough, anguishing work.

All of you also did an excellent job in summarizing your views and observations. It was especially helpful to me in trying to pull all of this into perspective. I am always so proud to be a Member of the Senate. There are some occasions that generate an even richer feeling than normal of my pride for this unique Chamber. The other evening, when the President pro tempore spoke of the reconciliation process, was one of those occasions. The way this proceeding has been conducted also gives me a surge of great pride.

Although I fully understand and appreciate the need for the public to know the business that their representatives are conducting—it is an unfortunate fact that we cannot seem to do our business or say the same things in public that we say or do in private. If we ever get to the point where we can, it will be an even better place to work and a better thing for the American people to know that it does work. We often meet together in little groups and when we leave—and there is a camera out there in front of us—all of a sudden some colleague has changed completely, one who just 20 minutes before was on your side. Suddenly, the mike was stuck in his face and he is now a wizard, except he is also on the other side from where he was. That is such a tedious process to watch. It happens too much. No wonder people do not always take too much truck in what we do.

I have heard some of the finest legal minds in this body speak today in a rich way. It has been an education. But today we are assembled as a jury—a jury of peers. The jury system was never designed to see who could offer the best legal argument during deliberations. It was designed to determine through common sense and life's experiences what was a lie and what was truth.

One of the things that makes us uniquely qualified to decide this case is our ability—every one of us—to know when someone is shooting straight or trying to sell us a bill of goods. We do it for a living. We have to know people in our line of work. Of course, we cannot know anyone else until we know ourselves. But because of the normal routine of our daily lives, each of us should be able to divine what is authentic and what is not.

It does not take much sense at all—common sense or horse sense—to know what this guy was doing. When you read about how he left Washington for Miami, his conduct with pay phones, the codes, and the relationship between his conduct and critical junctures in the *Romano* case, it is clear that he was a clever and duplicitous man. That is what you find when you go through all the stuff. The facts are not in dispute. Let me tell you, he really knows how to—let me put it delicately—shovel it out. He is magnificent at it, and all of us ought to be able to see that so clearly.

We are not talking about some guy who did not know the system. Hastings and Borders were a couple of real big leaguers. They knew exactly what they had to do to make the scheme work and how to avoid surveillance and how to hide their conversations with code. The short of it is, he got off on the criminal case because he phonied it all up. He gave fabricated testimony. Nor is this a case of double jeopardy. It has nothing to do with double jeopardy.

The judicial panel who brought this proceeding examined 108 additional people who were not examined at trial. Their determination was that Judge Hastings had fabricated his testimony, and they thus initiated this matter in order to protect themselves from a cancer in their midst. The House, by a vote of 413 to 3, voted to impeach Judge Hastings on 17 articles. They adopted a report that stated: "The evidence, considered in its totality, clearly and convincingly establishes that Judge Hastings was engaged in a plan designed to obtain a payment of money from defendants facing jail sentences." That he "sought to conceal his participation in the bribery scheme and to explain away evidence connecting him with the sale of justice and he pursued those objectives through concocting and presenting fabricated documents and false testimony."

That finding was determined by the House based on a comprehensive review of the transcripts of the jury trial and an examination of additional witnesses. They reached the sound and, I think, inescapable conclusion that Judge Hastings perjured himself.

In another life I did a bit of criminal defense work. I also handled prosecutions. I hated defense work because I did not like to be responsible for the freedom of another person, and I finally got out of that. I will never forget one client whom I was defending—pro bono. After giving him the whole load one day, I said: "You've got to tell me the truth. I am on your side. The only way you will win is to tell the truth." After about a day of trial, he turned to me and he said: "Wait a minute. I think I got it figured out. You mean all I have to do to keep from going to the pen is to lie?" I said, "Well, you have put it in a crisp way." And that is what all this is. If all you have to do to keep from getting impeached is lie, he did it. If all you have to do to keep from drawing your salary for life is lie, he did it.

Simply put, he fabricated the testimony that sprung him, and I think in our gut—we all know that. And now it is time to follow our head and our gut and defrock this fraud on the Federal judicial system. He fully deserves the fate of impeachment.

STATEMENT OF SENATOR HERBERT H. KOHL

Mr. KOHL. Mr. President, I want to begin by commending the Hastings Impeachment Committee for its diligence in listening to weeks of testimony and poring over literally hundreds of documents to bring the full Senate an objective assessment of this case. In particular, the chairman and vice chairman of the committee, Jeff Bingaman and Arlen Specter, deserve special praise.

This was an extremely difficult case, and it was a historic case. For the first time, the Congress removed a Federal judge who was previously acquitted by a jury. Judge Hastings argued that the Constitution's double jeopardy clause barred a second trial in the Senate. But while double jeopardy can clearly attach in criminal proceedings, I believe that it does not apply to impeachments. The 1974 House Judiciary Committee Report entitled "Constitutional Grounds for Presidential Impeachment" explains, "The purpose of impeachment is not personal punishment; its function is primarily to maintain constitutional government." In other words, impeachment remedies a weakness in government; as such, it is not punitive.

After extensive review of all the evidence, I came to the difficult decision to vote to convict Judge Hastings on eight of the articles of impeachment. On articles I through V and VI through IX, the House demonstrated by clear and convincing evidence that Judge Hastings and William Borders conspired to solicit a bribe in exchange for reducing the sentence against the Romano brothers. I also believe that Judge Hastings perjured himself at his criminal trial, by denying this bribery conspiracy, in order to ensure his acquittal.

However, I voted "not guilty" on articles VI and XVI, and I would have voted "not guilty" on articles X through XIII had they come to a vote as well. The House failed to meet its burden of proof in these articles, and for that reason I could not vote to convict.

Mr. President, many of my colleagues feel the impeachment process is far from ideal. I agree. Nevertheless, as difficult as the task was under the circumstances, we did not shirk our constitutional obligation. I believe that my colleagues and I examined the facts and came to a decision—the right decision. All the Members of this body should be commended for their thoughtfulness and hard work.

LEGISLATIVE PROCEEDINGS REGARDING THE HASTINGS IMPEACHMENT ARTICLES AND PROCEDURES

III

101st CONGRESS
1st Session

S. RES. 141

Directing the Senate Legal Counsel to represent the Senate defendants in The Honorable Alcee L. Hastings, United States District Judge v. The United States Senate, et al. (D.D.C.)

IN THE SENATE OF THE UNITED STATES

JUNE 2 (legislative day, JANUARY 3), 1989

Mr. DASCHLE (for Mr. MITCHELL) (for himself and Mr. DOLE) submitted the following resolution; which was considered and agreed to

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RESOLUTION

Directing the Senate Legal Counsel to represent the Senate defendants in The Honorable Alcee L. Hastings, United States District Judge v. The United States Senate, et al. (D.D.C.)

Whereas, in the case of The Honorable Alcee L. Hastings, United States District Judge v. The United States Senate, et al., No. 89-1602, pending in the United States District Court for the District of Columbia, the plaintiff has named as defendants the Senate; the Impeachment Trial Committee that has been appointed pursuant to Senate Resolution 38, 101st Congress, and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials; Walter J. Stewart, the Secretary of the Senate; and Joseph E. Jenifer, the Acting Public Printer of the United States;

Whereas, pursuant to section 703(a) and 704(a)(1) of the Ethics in Government Act of 1978, 2 U.S.C. 288b(a) and 288c(a)(1) (1982), the Senate may direct its Counsel to defend the Senate and its Members, committees, and officers in civil actions relating to their official responsibilities: Now, therefore, be it

Resolved, That the Senate Legal Counsel is directed to represent the United States Senate, the Impeachment Trial Committee, and Walter J. Stewart, the Secretary of the Senate, in the case of The Honorable Alcee L. Hastings, United States District Judge v. The United States Senate, et al.

CONSIDERATION AND ADOPTION OF S. RES. 141

[From the Congressional Record—Senate, June 2, 1989]

Mr. DASCHLE. Mr. President, on behalf of Senators Mitchell and Dole, I send a resolution to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The resolution will be stated by title.

The legislative clerk read as follows:

A resolution (S. Res. 141) directing the Senate Legal Counsel to represent the Senate defendants in the Honorable Alcee L. Hastings, United States District Judge versus the United States Senate, et al.

The PRESIDING OFFICER. Is there objection to the present consideration of the resolution.

There being no objection, the Senate proceeded to consider the resolution.

Mr. MITCHELL. Mr. President, yesterday, Judge Alcee L. Hastings filed an action in the District Court for the District of Columbia to challenge the impeachment proceedings that are pending against him in the Senate. The Senate parties that are named in the lawsuit are the Senate itself, the Impeachment Trial Committee, and the Secretary of the Senate. The complaint also names the Acting Public Printer as a defendant because he would print the committee's report.

Judge Hastings' complaint includes the claims that were rejected by the Senate in March, namely, that the articles on bribery and perjury are barred by his 1983 acquittal and that the summary article, article XVII, fails to state a separate impeachable offense. His complaint also alleges that the use of an impeachment trial committee is unconstitutional, that the Constitution requires that the Senate pay his defense costs, and that various pretrial rulings of the committee violate due process.

This resolution would direct the Senate Legal Counsel to represent the Senate defendants in this action to protect the Senate's sole power under the Constitution to try impeachments.

The PRESIDING OFFICER. The question is on agreeing to the resolution.

The resolution (S. Res. 141) was agreed to.

The preamble was agreed to.

The resolution, with its preamble, reads as follows:

S. RES. 141

Whereas, in the case of the Honorable Alcee L. Hastings, United States District Judge versus The United States Senate, et al., No. 89-1602, pending in the United States District Court for the District of Columbia, the plaintiff has named as defendants the Senate; the Impeachment Trial Committee that has been appointed pursuant to Senate Resolution 38, 101st Congress, and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials; Walter J. Stewart, the Secretary of the Senate; and Joseph E. Jenifer, the Acting Public Printer of the United States;

Whereas, pursuant to section 703(a) and 704(a)(1) of the Ethics in Government Act of 1978, 2 U.S.C. 288b(a) and 288c(1) (1982), the Senate may direct its Counsel to defend the Senate and its Members, committees, and officers in civil actions relating to their official responsibilities: Now, therefore, be it

Resolved, That the Senate Legal Counsel is directed to represent the United States Senate, the Impeachment Trial Committee, and Walter J. Stewart, the Secretary of the Senate, in the case of the Honorable Alcee L. Hastings, United States District Judge versus The United States Senate, et al.

101st CONGRESS
1st Session

S. RES. 143

Directing the Senate Legal Counsel to represent the Acting Public Printer in The Honorable Alcee L. Hastings, United States District Judge v. The United States Senate, et al. (D.D.C.).

IN THE SENATE OF THE UNITED STATES

June 8 (legislative day, January 3), 1989

Mr. Mitchell (for himself and Mr. Dole) submitted the following resolution; which was considered and agreed to

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RESOLUTION

Directing the Senate Legal Counsel to represent the Acting Public Printer in The Honorable Alcee L. Hastings, United States District Judge v. The United States Senate, et al. (D.D.C.).

Whereas, in the case of The Honorable Alcee L. Hastings, United States District Judge v. The United States Senate, et al., No. 89–1602, pending in the United States District Court for the District of Columbia, the plaintiff has named as defendants the Senate; the Impeachment Trial Committee that has been appointed pursuant to Senate Resolution 38, 101st Congress, and rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials; Walter J. Stewart, the Secretary of the Senate; and Joseph E. Jenifer, the Acting Public Printer of the United States;

Whereas, by Senate Resolution 141 of the 101st Congress, the Senate has directed the Senate Legal Counsel to represent the United States Senate, the Impeachment Trial Committee, and the Secretary of the Senate in this action;

Whereas, the complaint states that the plaintiff will be seeking an injunction to restrain the Acting Public Printer "from printing or distributing any records, transcripts, orders or reports submitted by or on behalf of the Impeachment Trial Committee or, with respect to Article I through XV and Article XVII, by or on behalf of the Senate";

Whereas, the Acting Public Printer has requested that the Senate authorize the Senate Legal Counsel to represent him in this proceeding together with the Senate defendants;

Whereas, pursuant to section 708(c) of the Ethics in Government Act of 1978, 2 U.S.C. 288g(c) (1982), the Senate may direct the Senate Legal Counsel to perform such other duties consistent with the statutory authority of the Senate Legal Counsel as the Senate may direct: Now, therefore, be it

Resolved, That the Senate Legal Counsel is directed to represent Joseph E. Jenifer, the Acting Public Printer of the United States, in the case of The Honorable Alcee L. Hastings, United States District Judge v. The United States Senate, et al.

CONSIDERATION AND ADOPTION OF S. RES. 143

[From the Congressional Record—Senate, June 8, 1989]

Mr. **Mitchell**. Mr. President, on behalf of Senator **Dole** and myself, I send to the desk a resolution directing the Senate Legal Counsel to provide representation for the acting Public Printer and ask for its immediate consideration.

The **Presiding Officer**. The clerk will report.

The legislative clerk read as follows:

A resolution (S. Res. 143) directing the Senate Legal Counsel to represent the acting Public Printer in the Honorable Alcee L. Hastings, United States District Judge v. The United States Senate, et al.

The **Presiding Officer**. Is there objection to the request of the majority leader?

There being no objection, the Senate proceeded to consider the resolution.

Mr. **Mitchell**. Mr. President, Senate Resolution 141, which was agreed to by the Senate on June 2, 1989, directs the Senate Legal Counsel to represent the Senate, the Impeachment Trial Committee, and the Secretary of the Senate in Judge Hastings' action in the District Court for the District of Columbia challenging the impeachment proceedings against him. Judge Hastings has also named the Acting Public Printer as a defendant to enjoin him from printing the committee's proceedings. Judge Hastings is additionally requesting an injunction against the printing of any proceedings that are conducted before the full Senate on Impeachment articles I through XV and XVII.

The Acting Public Printer has requested that the Senate authorize the Senate Legal Counsel to represent him in this action, together with the Senate defendants, as the Government Printing Office's sole function in this matter is to support the Senate in any printing that it requires for the pending impeachment. This resolution would provide that authorization.

The **Presiding Officer**. The question is on agreeing to the resolution.

The resolution was agreed to.

The preamble was agreed to.

The resolution (S. Res. 143), with its preamble, reads as follows:

S. Res. 143

Whereas, in the case of *The Honorable Alcee L. Hastings, United States District Judge v. The United States Senate, et al.*, No. 89-1602, pending in the United States District Court for the District of Columbia, the plaintiff has named as defendants the Senate; the Impeachment Trial Committee that has been appointed pursuant to Senate Resolution 38, 101st Congress, and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials; Walter J. Stewart, the Secretary of the Senate; and Joseph E. Jenifer, the Acting Public Printer of the United States;

Whereas, by Senate Resolution 141 of the 101st Congress, the Senate has directed the Senate Legal Counsel to represent the United States Senate, the Impeachment Trial Committee, and the Secretary of the Senate in this action;

Whereas, the complaint states that the plaintiff will be seeking an injunction to restrain the Acting Public Printer "from printing or distributing any records, transcripts, orders or reports submitted by or on behalf of the Impeachment Trial Committee or, with respect to Article I through XV and Article XVII, by or on behalf of the Senate";

Whereas, the Acting Public Printer has requested that the Senate authorize the Senate Legal Counsel to represent him in this proceeding together with the Senate defendants;

Whereas, pursuant to section 708(c) of the Ethics in Government Act of 1978, 2 U.S.C. 288g(c) (1982), the Senate may direct the Senate Legal Counsel to perform such other duties consistent with the statutory authority of the Senate Legal Counsel as the Senate may direct; Now, therefore, be it

Resolved, That the Senate Legal Counsel is directed to represent Joseph E. Jenifer, the Acting Public Printer of the United States, in the case of *The Honorable Alcee L. Hastings, United States District Judge v. The United States Senate, et al.*

Mr. MITCHELL. Mr. President, I move to reconsider the vote by which the resolution was agreed to.

Mr. McCLURE. I move to lay that motion on the table.

III

Calendar No. 195

101st CONGRESS
1st Session

S. RES. 162

[Report No. 101-98]

Directing the Senate Legal Counsel to bring a civil action to enforce subpoena of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings.

IN THE SENATE OF THE UNITED STATES

August 1 (legislative day, January 3), 1989

Mr. **Bingaman** (from the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings) reported the following resolution; which was placed on the calendar

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RESOLUTION

Directing the Senate Legal Counsel to bring a civil action to enforce subpoena of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings.

Whereas William A. Borders, Jr., appeared before the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings ("Impeachment Trial Committee" or "Committee") on July 24 and 27, 1989, pursuant to the Committee's subpoena;

Whereas, on July 24, 1989, the Chairman of the Impeachment Trial Committee communicated to William A. Borders, Jr., an immunity order that had been issued by the United

States District Court for the District of Columbia pursuant to 18 U.S.C. §§ 6002 and 6005 (1982), but on July 24, 1989, and again on July 27, 1989, William A. Borders, Jr., refused to answer the Committee's questions to him about facts pertinent to the Articles of Impeachment;

Whereas under sections 703(b) and 705 of the Ethics in Government Act of 1978, 2 U.S.C. §§ 288b(b) and 288d (1988), the Senate Legal Counsel shall bring a civil action under 28 U.S.C. § 1365 (Supp. V 1987) to enforce a subpoena of a Senate committee when directed to do so by the adoption of a resolution by the Senate;

Whereas the Senate will have a continuing interest in the continuing interest in the testimony of William A. Borders, Jr., until its final disposition of the Articles of Impeachment: Now, therefore, be it

Resolved, That the Senate Legal Counsel shall bring a civil action in the name of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings to enforce the Committee's subpoena to William A. Borders, Jr., and the Senate Legal Counsel shall conduct all related civil contempt proceedings.

SEC. 2. Until the final disposition by the Senate of the Articles of Impeachment against Judge Alcee L. Hastings, the Impeachment Trial Committee is authorized to continue this action to enforce the Committee's subpoena to William A. Borders, Jr., to hear his testimony, to report that testimony to the Senate, and to report to the Senate any further resolution for the civil or criminal enforcement of the Committee's subpoena to him.

Calendar No. 195

101st Congress
1st Session

SENATE

Report
101-98

REFUSAL OF WILLIAM A BORDERS, JR., TO TESTIFY BEFORE THE IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS

August 1 (legislative day, January 3), 1989.—Ordered to be printed

Mr. Bingaman, from the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, submitted the following

REPORT

[To accompany S. Res. 162]

The Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings reports an original resolution to direct the Senate Legal Counsel to bring a civil action to enforce the Committee's subpoena to William A. Borders, Jr., and recommends that the resolution be agreed to.

PURPOSE

On July 24 and 27, 1989, William A. Borders, Jr., appeared under subpoena before the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings but refused to answer the Committee's questions. Mr. Borders is a central figure in the Articles of Impeachment. Article I alleges that "[f]rom some time in the first half of 1981 and continuing through October 9, 1981, Judge Hastings and William Borders, then a Washington, D.C. attorney, engaged in a corrupt conspiracy to obtain $150,000 from defendants in *United States* v. *Romano*, a case tried before Judge Hastings, in return for the imposition of sentences which would not require incarceration of the defendants." Articles II–VI and VIII–IX also specifically refer to Mr. Borders. In light of the potential value of his testimony and its determination that he has no valid basis to refuse to testify, the Committee recommends that the Senate direct the Senate Legal Counsel to bring a civil action to require Mr. Borders to testify on facts that are pertinent to the Articles of Impeachment.[1]

DISCUSSION

Section 705(c) of the Ethics in Government of 1978, 2 U.S.C. § 288d(c) (1988), provides that a committee which reports a resolution to authorize a civil action to enforce a subpoena must submit a report that discusses the following subjects:

> (A) the procedure followed in issuing such subpoena;
>
> (B) the extent to which the party subpoenaed has complied with such subpoena;
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> (C) any objections or privileges raised by the subpoenaed party; and
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> (D) the comparative effectiveness of bringing a civil action under this section, certification of a criminal action for contempt of Congress, and initiating a contempt proceeding before the Senate.

This report discusses each subject in turn.

A. The procedure followed in summoning the witness

After ascertaining on July 18, 1989, that neither the House nor Judge Hastings intended to call Mr. Borders as a witness, Transcript at 1314–26, the Committee voted on July 19, 1989, to issue on its own initiative a subpoena to Mr. Borders to appear before it on July 24, 1989. The Committee publicly announced the subpoena after it was served personally on Mr. Borders by a United States marshal on July 20, 1989.

B. Extent to which the witness complied with the subpoena

Mr. Borders appeared before the Committee on July 24, 1989, accompanied by counsel, and took the oath. After his counsel stated Mr. Borders' objections to testifying, Transcript at 1953–55, the Chairman ascertained from the witness that his refusal to testify was "based, at least in part, on your asserting a privilege against self-incrimination," id. at 1955, communicated to him an immunity order that had been issued by the United States District Court for the District of Columbia on June 27, 1989, pursuant to 18 U.S.C. §§ 6002 and 6005 (1982), and directed him to answer the Committee's questions, id. at 1956. Stating that his counsel had appealed the immunity order and would be filing for a stay of it, Mr. Borders requested "that they be given time to do that," id. at 1959, and "respectfully refuse[d] to answer any and all questions based on the Fifth Amendment, the Sixth Amendment, the Eighth and Fourteenth Amendments." Id.

The Committee retired to deliberate on Mr. Borders' objections. On returning to open session, the Chairman advised the witness that the Committee had determined that he had no right to refuse to answer its questions and directed him to answer them. Id. at

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[1] The Impeachment Trial Committee was appointed pursuant to Senate Resolution 38 of the 101st Congress and rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials. Section 3 of Senate Resolution 38 provides that "'[t]he committee shall be deemed to be a standing committee of the Senate for the purpose of reporting to the Senate resolutions for the criminal or civil enforcement of the committee's subpoenas or orders."

1979. Mr. Borders continued to refuse to answer the Committee's questions, including a comprehensive question, as follows:

> The CHAIRMAN. Let me ask one final comprehensive question if I could at this time, Mr. Borders. The committee needs to know whether or not Judge Hastings and you planned together to solicit and accept money from a person who you thought was a defendant in a case before Judge Hastings in return for a modification of the sentence of the defendant and his brother. Among the particular facts that the Senate will need to determine are whether Judge Hastings and you arranged that he would eat at the Fountainebleau Hotel on September 16th of 1981 as a sign that he was a participant in the bribery scheme, and whether or not actions that he took in reducing a forfeiture that had been imposed on the defendants, including the timing of this final order on the forfeiture, were intended to be further signs that he was a participant in the bribery scheme. Additionally, the Senate will need to determine whether on October 5th of 1981 when you and Judge Hastings spoke by telephone and referred to "letters for Hemp," whether you were genuinely discussing help for Hemphill Pride or acting in furtherance of this bribery scheme.
>
> Mr. Borders, are your refusing to testify about each of those matters?
>
> Mr. BORDERS. My answer would be the same to each one, incorporating my statement and answer to each one, sir.

Id. at 1980–81. The Chairman informed Mr. Borders that he should appear again before the Committee on July 27, 1989, and "that in the interim * * * you can use the time to consult with your counsel to pursue the appeal you referred to, take any other legal action you deem appropriate." Id. at 1981.

Mr. Borders returned to the Committee on July 27, 1989, as scheduled. He objected to the Committee's decision to call him after the House and Judge Hastings had declined to do so. Id. at 2805. Acknowledging that he remained under oath and that the immunity order which had been communicated to him remained in effect, he objected that "the immunity does not and cannot force me to testify in deprivation of my [rights under the] First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." Id. at 2806. He concluded by stating, "I respectfully refuse to answer any and all questions * * * and would respectfully request this committee to dismiss me and allow me to reshape and pursue my life." Id. at 2807.

After reviewing the status of Mr. Borders' challenge to the immunity order and noting that it remained unstayed and in effect, the Chairman again directed him to answer the Committee's questions. Id. at 2810.[2] Mr. Borders stood on his statement and refused to answer all questions. Id. at 2810–11. the Chairman advised him that while the Committee anticipated that the testimony of the parties' witnesses would be completed by August 4, 1989, the Committee's record would remain open to hear his testimony.

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[2] At the conclusion of Mr. Borders' appearance, the Chairman verified that the witness understood that both the objections he had raised on July 24, 1989, and the additional objections which he stated on July 27, 1989, had been overruled and the witness nonetheless refused to answer all questions. Id. at 2817–18.

C. Objections or privileges raised by the witness

The requirement that a committee seeking civil enforcement of its subpoena report on "any objections or privileges raised by the subpenaed party," 2 U.S.C. § 288d(c), ensures that the Senate "will have all relevant information before it when making its determination. By requiring a committee to note both objections as well as privileges, all arguments made by the subpenaed party with respect to the subpena will be presented for consideration—whether or not legally dispositive." S. Rep. No. 170, 95th Cong., 1st sess. 91 (1977). In this part of our report, we will describe the three principal objections presented by Mr. Borders.

1. The witness's claim that the immunity order is defective

The order entered by the district court on June 27, 1989, and communicated to the witness on July 24, 1989, provided "That William A. Borders, Jr., may not refuse to testify, and provide other information, at proceedings of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, on the basis of his privilege against self-incrimination." In return for his being required to testify, the district court "*Further ordered,* That no testimony or other information compelled under this Order (or any information directly or indirectly derived from such testimony or other information) may be used against [Mr. Borders] in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this Order."

This "proscription of the use in any criminal case" of testimony compelled from the witness "is consonant with Fifth Amendment standards. * * * [It] is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." *Kastigar* v. *United States,* 406 U.S. 441, 453 (1972). The Committee believes that Mr. Borders' challenge to the immunity order is not based on any real concern about the adequacy of the order's protection of his Fifth Amendment privilege.[3] Mr. Borders' claim is that the order should not have been issued because of a defeat in the notification given by the Department of Justice to the Committee that the Department had no interest in delaying the Committee's application. To place Mr. Borders' objection in context, we will review the statutory requirements for the issuance of an immunity order and the actions taken by the Committee, the Department of Justice, and the Court in immunizing Mr. Borders.

The Committee was aware that Mr. Borders had relied in part on the Fifth Amendment when he refused to testify during the House of Representatives' impeachment inquiry,[4] and that an immunity order would be necessary if the Committee was to hear his testimony. On May 22, 1989, committee counsel advised the Department of Justice's Witness Immunity Unit, which is part of the Criminal Division, of the possibility that the Committee would apply for an immunity order for Mr. Borders' testimony. The Department was prepared, consequently, to respond quickly when, on June 8, 1989, "the Attorney General was served" by the Senate Legal Counsel "with notice of [the Committee's] intention to request the order." 18 U.S.C. § 6005(b) (3). The notification to the Attorney General followed the Committee's vote on June 7, 1989, pursuant to 2 U.S.C. §§ 288b(d) and 288f (1988), to direct the Senate Legal Counsel to apply for a court order immunizing from use in prosecutions Mr. Borders' testimony at proceedings of the Committee. The resolution was approved by nine of the twelve members of the Committee in accordance with the requirement that a request for an immunity order be approved by an affirmative vote of two-thirds of the committee. 18 U.S.C. § 6005(b)(2).

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[3] Although Mr. Borders' counsel, in a letter to the Committee, expressed a concern about state prosecution, that fear is unfounded because the immunity afforded to Mr. Borders protects him against the use of his testimony in "any criminal case," 18 U.S.C. § 6002, whether state or federal. *In re Grand Jury Proceedings, No. 84–4 (Hartmann),* 757 F.2d 1580, 1582 (5th Cir. 1985) ("State courts are required to respect the immunity granted under [18 U.S.C.] § 6002."); see also *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964).

On June 9, 1989, the Department sent to the Senate Legal Counsel a waiver of its right to a limited delay in the filing of the Committee's immunity application, stating that it "has no objection to the proposed order to compel the testimony of William A. Borders, Jr., and hereby waives the provisions of 18 U.S.C. Section 6005(b)(3) and (c)." Section 6005(b)(3) provides that the Attorney General should have ten days notice prior to the filing by a congressional committee of an immunity application. As will be described below, the Department of Justice's power to waive the notice requirement was upheld by the District of Columbia Circuit in *In re Application of United States Senate Permanent Subcommittee on Investigations (Cammisano),* 655 F.2d 1232, 1236–38 (D.C. Cir.), cert. denied, 454 U.S. 1084 (1981). Section 6005(c) authorizes the Attorney General to obtain an additional twenty-day deferral of the issuance of an order after a committee applies for it. The Department's letter was signed by John Mackey for Carol Crawford, the Assistant Attorney General for Legislative Affairs. Mr. Mackey is a Deputy Assistant Attorney General for Legislative Affairs, but the letter did not state his title.

On the basis of the Department's waiver, the Committee applied to the District Court for the District of Columbia, on June 14, 1989—rather than waiting until June 18, 1989, when it could have proceeded without a waiver—for an immunity order for Mr. Borders' testimony. The Committee had been permitting the parties to conduct a limited number of pretrial examinations in June; the slight expedition of the application for the immunity order enabled the Committee to be prepared if the parties sought, or the Committee independently determined to conduct, a pretrial examination of Mr. Borders.

As it turned out, Mr. Borders was not summoned to a pretrial examination. Also, the district court did not act immediately on the immunity application, but set the application down for a hearing on June 26, 1989. Mr. Borders appeared and opposed the issuance of the immunity order. He claimed, even though by then more than ten days had passed since the Attorney General had been notified, that a proper official had not waived the Department's right to ten-days' notice prior to the filing of the immunity application. In response to Mr. Borders' objection, the district court suggested, without holding that it was necessary to do so, that the Committee file a waiver signed by a presidential appointee, which the Committee did on June 27, 1989, when it filed a letter signed by Assistant Attorney General Crawford, which provided Mr. Mackey's title, stated that he had been authorized to sign the correspondence in the Assistant Attorney General's absence, and reiterated the Department's waiver. Upon the filing of that letter, the district court "determin[ed] that the procedural requirements set forth in 18 U.S.C. § 6005 have been satisfied," and issued the immunity order.

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[4] Impeachment Inquiry: Hearings before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 100th Cong., 2d sess. 225 (1988).

The claim which Mr. Borders is asserting, that the Department of Justice did not use a proper official in waiving the period for its advance notice of the filing of an immunity application, involves a provision that was never intended to benefit a potential witness. Rather, as the United States Court of Appeals for the District of Columbia Circuit has held, the ten-day notice provision "was plainly intended to benefit *solely* the Department of Justice." *Cammisano,* 655 F.2d at 1236 (emphasis in opinion). The purpose of the notification provision is to "provide[ ] the Department of Justice with 'time to "lobby" for a change of mind' on the part of the congressional committee should the Attorney General object to the grant of immunity." Id. (citation omitted). In denying Mr. Borders' motion for a stay pending appeal, the district court emphasized this point when it held that "[i]t is unlikely that Mr. Borders will prevail on the merits of his appeal for, among other reasons, [the notification provision] is designed to protect the Attorney General's interests—not that of the prospective witness." *In re Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings (Borders),* Misc. No. 89-129, Memorandum of July 26, 1989 (D.D.C.).[5]

Mr. Borders argues that *United States* v. *Giordano,* 416 U.S. 505 (1974), establishes by analogy a requirement that waiver of the notification period under the immunity statute requires "[t]he mature judgment of a particular, responsible Department of Justice official," just as the Congress has required that the judgment of such an official is "a critical precondition to any judicial order" to intercept wire communications. Id. at 515–16. There is a vast difference, however, between the specific demonstration of high-level judgment that the Congress has required before the Department may apply to the judicial branch for a wire intercept order, and how the Department may communicate to a committee of the Congress that, because the Department has no interest in prosecuting an individual (whom it has already prosecuted), the committee need not delay its application to the court for an immunity order. The Assistant Attorney General in charge of the Office of Legislative Affairs has responsibility for "[m]aintaining liaison between the Department and Congress," 28 C.F.R. § 0.27, and is a perfectly appropriate official to communicate to the Congress the determination that no interest of the Department stands in the way of an immediate application by a committee for an immunity order.

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[5] Because the notification provision in the immunity statute is for the sole benefit of the Department of Justice, it is important to note that the Department of Justice's interest in prosecuting Mr. Borders in connection with the alleged conspiracy to bribe Judge Hastings was satisfied by Mr. Borders' conviction in 1982. Following his conviction, the Department itself obtained a use immunity order for Mr. Borders' testimony before a grand jury that reportedly was investigating another bribery matter concerning Judge Hastings. *In Re: Grand Jury Proceedings, Grand Jury 81-1 (Mia.) (William A. Borders, Jr.),* Order of July 26, 1982 (S.D. Fla.).

Furthermore, the passage of time has robbed Mr. Borders' objection of any legal significance. The committee notified the Attorney General on June 8, 1989 of its intent to apply for an immunity order. Without any waiver or other response from the Department of Justice, the committee could have applied for an immunity order as early as June 18, 1989. Hence, by the time that the district court heard the matter on June 26, 1989, more than ten days had passed since the committee's notification to the Attorney General on June 8, 1989. Between June 8, 1989 and July 24, 1989, the return date on the subpoena to Mr. Borders, forty-six days had elapsed, or more than the total of thirty days by which the Department could have delayed the committee's application for an immunity order if it had exercised all authority that it possessed under the immunity statute to protect its prosecutorial interests. Thus, the district court correctly observed in denying Mr. Borders' stay application that "the Department of Justice has now had more than ten days in which to protect its interest so that any defect in the notice or the waiver is of no material consequence to Mr. Borders." Memorandum of July 26, 1989, at 2.

Mr. Borders filed a notice of appeal on July 6, 1989, from the grant of the immunity order, but took no immediate action to stay the effectiveness of the order. When Mr. Borders appeared before the Committee on July 24, 1989, he asked for time to enable his counsel to apply for a stay. After Mr. Borders' appearance on July 24, the Senate Legal Counsel filed a motion in the court of appeals to dismiss Mr. Borders' appeal, or, in the alternative, for summary affirmance. The Senate Legal Counsel moved to expedite the consideration of that motion. Mr. Borders' counsel moved to delay the consideration of the motion by extending the time to respond to it. The court of appeals denied both the motion to expedite and the motion to delay. In explaining why the Committee would not suffer irreparable injury by the denial of expedition, the court of appeals "note[d] that if [Mr. Borders] refuses to comply with [the] district court's order filed June 27, 1989, [the Committee] may seek enforcement through civil contempt proceedings." *In re Application of Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings*, No. 89-5189, Order of July 26, 1989 (D.C. Cir.).

The filing of an appeal does not vitiate the effectiveness of an immunity order. One reason that the Congress has placed limits on the period during which the Department of Justice may delay the issuance of an immunity order for congressional testimony is to assure that the Congress's access to necessary information is not unduly delayed. It would defeat this central purpose of the immunity statute then to make the process of immunization subject to the uncertainties of appellate calendars. The Committee exercised its discretion in providing Mr. Borders with time to seek a stay, but when he was unable to obtain one the Committee determined that it should proceed to enforce its subpoena, as the court of appeals has stated unambiguously that the Committee may do.

2. The witness's objections to being summoned after having served a prison sentence on his underlying criminal conviction and having been confined for civil contempt for refusing to testify before a grand jury

Mr. Borders' principal objection to the Committee's subpoena to him is that he served a term of imprisonment and paid a fine imposed on him following his criminal conviction in 1982 for conspiring to bribe Judge Hastings,[6] and that, "[a]bove and beyond that, with regard to the same subject matter which is here under consideration today," Transcript at 1954, he was incarcerated for civil contempt in 1982 for refusing to testify before a grand jury in the Southern District of Florida.[7] He asserts that requiring him to testify would be a denial of due process, violate the constitutional prohibition against double jeopardy, and constitute cruel and unusual punishment. More generally, Mr. Borders stated to the Committee that "I believe my legal debt to society has been paid in full." Transcript at 2805.

Mr. Borders' criminal sentence poses no legal impediment to the Committee's subpoena. Immunity statutes have been enacted for the very reason "that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime." *Kastigar* v. *United States,* 406 U.S. 441, 446 (1972).[8] Conviction and imprisonment does not excuse a participant from providing testimony about the culpability of others for "[i]f two persons witness an offense—one being an innocent bystander and the other an accomplice who is thereafter imprisoned for his participation—the latter has no more right to keep silent than the former." *Piemonte* v. *United States,* 367 U.S. 556, 559 n.2 (1961).

Neither does Mr. Borders' incarceration for forty days in 1982 for civil contempt for failing to testify before a grand jury excuse him from testifying in this impeachment proceeding.[9] His incarceration in 1982 until "such time as he is willing to comply" with the order that he testify, see note 7 supra, was an exercise of "the power of courts to impose conditional imprisonment for the purpose of compelling a person to obey a valid order. Such coercion, where the defendant carries the keys to freedom in his willingness to comply with the court's directive, is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees." *Green* v. *United States,* 356 U.S. 165, 197 (1958) (Black, J., dissenting). Even for the same act of contumacy, "civil and criminal sentences serve[ ] distinct purposes, the one coercive, the other punitive and deterrent." *Yates* v. *United States,* 355 U.S. 66, 74 (1957). Consequently, "that the same act may give rise to these distinct sanctions presents no double jeopardy problem." [10]

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[6] Transcript at 2803. Mr. Borders entered the Allenwood Federal Prison Camp on May 25, 1983, where he was imprisoned until Dec. 10, 1985, when he entered a halfway house, Hope Village. He was released from Hope Village on Feb. 24, 1986, and was on parole until May 27, 1988. Id. at 2802–03. Of his five-year sentence, he was incarcerated for about thirty-three months (including the time in the halfway house) and was on parole for about twenty-seven months.

[7] Transcript at 2804. Mr. Borders was subpoenaed to appear before a grand jury in the Southern District of Florida on June 8, 1982, a month after he had been sentenced in his criminal case, but refused, even after an immunity order was obtained for him that day, to testify. On July 26, 1982, the district court entered an "Order and Judgment of Civil Contempt" under 28 U.S.C. § 1826, and "committed [Mr. Borders] to the custody of the United States Marshal to be confined at a suitable place until such time as he is willing to comply with this Court's order of June 8, 1982, or for the remaining life of the term of Grand Jury 81–1 (MIA.), or for eighteen (18) months, whichever first occurs." *In re: Grand Jury Proceedings, Grand Jury 81–1 (Mia.) (William A. Borders, Jr.),* Order of July 26, 1982 (S.D. Fla.). Mr. Borders remained in custody under this civil contempt order for about forty days.

[8] Indeed, as the Court noted in *Kastigar*, a "notable instance of the early use of immunity legislation is the 1725 impeachment trial of Lord Chancellor Macclesfield. The Lord Chancellor was accused by the House of Commons of the sale of public offices and appointments. In order to compel the testimony of Masters in Chancery who had allegedly purchased their offices from the Lord Chancellor, and who could incriminate themselves by so testifying, Parliament enacted a statute granting immunity to persons then holding office as Masters in Chancery." 406 U.S. at 445 n.13.

[9] In papers filed in the Southern District of Florida in response to the Government's contempt motion, Mr. Borders referred to newspaper articles that he had been summoned to testify about the solicitation of a bribe in another criminal case before Judge Hastings.

Mr. Borders' objection to the Committee's subpoena fails for two other fundamental reasons. The first is that no one is now seeking to punish him. The Committee's subpoena seeks his testimony, not his punishment. Even if a civil enforcement action is authorized by the Senate, the district court will be asked first to issue an order requiring Mr. Borders to comply with the Committee's subpoena. 28 U.S.C. § 1365(b) (Supp. V 1987). The question of civil coercion will arise only if Mr. Borders refuses to obey the court's order. If Mr. Borders believes that the power of the courts to compel his obedience to a judicial order that he testify before the Committee is limited by his civil incarceration in 1982 for failing to testify before a grand jury, he may raise that defense in a civil contempt proceeding in the district court. Mr. Borders' objections based on the double jeopardy and cruel and unusual punishment clauses, as misplaced as the Committee believes they are, apply at most only to the sanctions that may be imposed on him and not to his underlying obligation to testify.

Morever, Mr. Borders' obligation in 1982 to testify before the grand jury and his obligation in 1989 to testify before the Senate or its committee in the pending impeachment are totally separate from each other. Judge Hastings must defend himself against the articles exhibited by the House because double jeopardy is not a bar to them. Many witnesses have been required to testify even though they have testified before the grand jury, at Judge Hastings' or Mr. Borders' criminal trials or both, and before an investigating body in the Judicial Branch. This has been necessary because impeachment serves a distinct constitutional function that is not estopped by prior proceedings in the executive and judicial branches. Whether Mr. Borders testified or not in prior proceedings in other branches, or resisted or yielded to coercion in those proceedings, the Senate has a separate entitlement to his testimony in carrying out its "sole Power to try all Impeachments" under Article I, section 3, clause 6 of the Constitution.

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[10] Id. The Eighth Amendment's prohibition against cruel and unusual punishment is inapplicable to a judgment of civil contempt that results only in incarceration pending compliance. *Ingraham* v. *Wright,* 430 U.S. 651, 688 (1977); *United States* v. *Dien,* 598 F.2d 743, 745 (2d Cir. 1979).

3. The witness's objection to the committee's decision to call him on its own initiative

Mr. Borders also objects to the Committee's determination to call him as a witness after the House and Judge Hastings decided not to do so. On July 18, 1989, the Committee had heard from the parties on "the issue of whether Mr. Borders should be called as a witness by the committee, or whether either side intends to, and the reasons for that decision." Transcript at 1314 (Chairman Bingaman). The House stated that it would not call Mr. Borders because it believed that its case was sufficient without him, that Mr. Borders would be recalcitrant, and that the House doubted his credibility, but "[w]e will take no position on whether the Senate committee should or should not call him, and we will surely participate in whatever decision it chooses to make." Id. at 1315 (Manager Bryant). Counsel for Judge Hastings advised the Committee that the respondent would not call Mr. Borders. He stated that Mr. Borders had "lied [in 1981] about his ability to affect the fate of Alcee Hastings. We have no intention to give him a second chance to come forward and lie in [a] manner that might affect the fate of Alcee Hastings. We take no position on what the committee should do." Id. at 1321 (Mr. Anderson).

Mr. Borders' objection is best described using his words:

> The committee has decided to call me even though they're allegedly not serving as a prosecutor but, rather, as the chief adjudicatory body. I had always thought that prosecution and judgment are two quite separate functions in the administration of any justice. Consequently, the two should not merge. * * * However, this committee has apparently sought to ignore such a natural course of events in favor and embrace of a marriage between prosecution and judgment.

Transcript at 2805–06.

The Committee agrees with the principle that prosecution and judgment are different functions. Mr. Borders is wrong, however, in describing the decisions to call him as "a marriage between prosecution and judgment." The decision to call Mr. Borders was not intended to favor either the House or Judge Hastings. The Committee has no preconception about whether Mr. Borders' testimony would favor one side or the other. Rather, it has concluded that the effort to find the truth, whoever may be favored by it, would be aided by hearing from the one person other than the respondent who has personal knowledge of it.

An impeachment trial, no less than a trial in a court of law, "is not a game of blind man's bluff; and the trial judge—particularly in a case where he himself is the trier of the facts upon which he is to pronounce the law—need not blindfold himself by failing to call an available vital witness simply because the parties, for reasons of trial tactics, choose to withhold his testimony." *Johnson* v. *United States*, 333 U.S. 46, 54 (1948) (Frankfurter, J., dissenting in part).[11]

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[11] Although the Senate is not bound by the Federal Rules of Evidence, the Committee has utilized the rules for guidance. Rule 614 provides that "[t]he court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called."

Moreover, the Senate's task is more than that of resolving a private controversy between the House and Judge Hastings. The Senate has the sole power under the Constitution to remove from office a life-tenured judge, a decision which has implications not only for the judge involved but our constitutional system. In the light of the Senate's unique responsibilities, the Committee concluded that it should not allow the tactical decisions of the parties to foreclose the Senate's opportunity to hear and to evaluate Mr. Borders' testimony.

D. Comparative effectiveness of a civil action or a certification to the United States attorney for criminal prosecution

The Committee has considered the comparative effectiveness of a civil action to enforce the Committee's subpoena compared to an immediate referral to the United States Attorney for a criminal prosecution.[12]

In a civil action under 28 U.S.C. § 1365 (Supp. V 1987), the Committee would apply, upon authorization of the Senate, to the United States District Court for the District of Columbia for an order requiring the witness to answer the Committee's questions. If the district court determines that the witness has no valid reason to refuse to testify, the court would direct the witness to answer the Committee's questions. Disobedience of that order would subject the witness to sanctions to induce compliance. The witness could free himself of the sanctions by testifying. Sanctions could not continue beyond the Senate's need for the witness's testimony; in an impeachment proceeding, the Senate's need for testimony would terminate upon its disposition of the articles of impeachment.

In a criminal referral under 2 U.S.C. §§ 192–194 (1988), the Senate would direct the President pro tempore to certify to the United States Attorney for the District of Columbia the facts concerning the witness's refusal to testify. The United States Attorney would then present the matter to a grand jury, which could indict the witness for contempt of Congress. If convicted, the witness could receive a sentence of up to a year in prison and a $1,000 fine.

The Committee is recommending to the Senate that it proceed at this time with a civil action. The Committee's objective is to obtain Mr. Borders' immediate testimony; the purpose of the civil remedy is to achieve that objective rather than to punish the witness. However, as the Chairman advised Mr. Borders, "the committee's decision to pursue a civil enforcement action at this time does not preclude a later determination to refer the matter to the United States attorney for criminal prosecution for contempt of Congress." Transcript at 2812; see S. Rep. No. 170, 95th Cong., 1st Sess. 95–96 (1977) ("Once a committee investigation has terminated, a criminal contempt of Congress citation under 2 U.S.C. 192, et. seq., might still be referred to the Justice Department if the Congress finds this appropriate. Such prosecution for criminal contempt would present no double jeopardy problem. *In re Chapman,* 166 U.S. 661 (1897); *Yates* v. *United States*, 355 U.S. 66 (1957)").

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[12] The Senate has not utilized for the past four decades its power to try a recalcitrant witness before the bar of the Senate.

COMMITTEE'S ROLLCALL VOTE

In compliance with paragraph 7 (b) and (c) of rule XXVI of the Standing Rules of the Senate, the record of the rollcall vote of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings to report the original resolution favorably was as follows:

YEAS	NAYS
Mr. Bingaman	
Mr. Specter	
Mr. Leahy	
Mr. Pryor	
Mr. Bryan	
Mr. Kerrey	
Mr. Lieberman	
Mr. Durenberger	
Mr. Rudman	
Mr. Bond	
Mr. Gorton	
Mr. Burns	

○

CONSIDERATION AND ADOPTION OF S. RES. 162

[Adopted August 1, 1989; printed in the Congressional Record—Senate, August 3, 1989]

Mr. MITCHELL. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of Calendar No. 195, Senate Resolution 162.

The PRESIDING OFFICER. The resolution will be stated by title.

The assistant legislative clerk read as follows:

A resolution (S. Res. 162) directing the Senate legal counsel to bring a civil action to enforce subpoena of the Impeachment Trial Committee on the articles against Judge Alcee L. Hastings.

The PRESIDING OFFICER. Is there objection to the present consideration of the resolution?

There being no objection, the Senate proceeded to consider the resolution.

Mr. MITCHELL. Mr. President, the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings has reported by the unanimous vote of its 12 members an original resolution to direct the Senate Legal Counsel to bring a civil action to enforce the Committee's subpoena to William A. Borders, Jr. Mr. Borders is the now disbarred Washington, DC attorney with whom Judge Hastings is alleged to have conspired to solicit a bribe to modify the sentence of two defendants in a case that was tried before Judge Hastings.

Mr. Borders appeared before the committee on July 24 and 27, 1989, but refused to answer the committee's questions. The committee's report, Senate Report 101-98, sets forth for the Senate's consideration the objections raised by the witness and the committee's carefully considered reasons for overruling them. The committee subpoenaed Mr. Borders on its own initiative after concluding, as its report states, "that the effort to find the truth, whoever may be favored by it, would be aided by hearing from the one person other than the respondent who has personal knowledge of it." By adopting this resolution, the Senate will endorse and ratify the committee's determination that its subpoena is an appropriate means of fulfilling its responsibility to report the evidence in this impeachment to the Senate.

Under the civil enforcement statute, the Senate Legal Counsel will apply to the U.S. District Court for the District of Columbia for an order to enforce the committee's subpoena. If the court issues an order to direct the witness to testify before the committee, but the witness refuses to obey the order, the Senate Legal Counsel will be authorized under section 1 of the resolution to apply to the district court for the imposition of civil sanctions to induce compliance.

Section 2 of the resolution provides that until final disposition by the Senate of the Articles of Impeachment the Impeachment Trial Committee is authorized to continue this action to enforce the subpoena to Mr. Borders, and to hear and report his testimony to the Senate. The committee will also be authorized to report further resolutions to the Senate on the enforcement of the subpoena to Mr. Borders, including a resolution to certify the witness's contempt to the U.S. Attorney for the District of Columbia for prosecution as a criminal contempt of Congress.

I urge the adoption of the resolution.

Mr. BINGAMAN. Mr. President, on May 17, 1989, the Impeachment Trial Committee on the Articles of Impeachment Against Judge Alcee L. Hastings adopted two rules to govern aspects of its pretrial proceedings. Those rules were published in the Congressional Record on June 7, 1989.

An additional rule has been adopted by the Impeachment Trial Committee. This rule concerns the taking of testimony from Mr. William A. Borders, Jr., who was subpoenaed to appear as a witness by the Impeachment Trial Committee but has, to date, refused to testify. The committee has recommended that the Senate authorize a civil enforcement action at this time. It has advised Mr. Borders that although it anticipates that the taking of testimony of the parties' witnesses will be completed by August 4, 1989, it will be prepared to hear his testimony both during the August recess and thereafter. This rule implements the committee's decision that the taking of Mr. Borders' sworn testimony during the recess may proceed before a quorum of one member. Some or all of the other members of the committee may, of course, also be present.

I hereby submit that rule and ask that it be printed in the Record, 1as follows:

There being no objection, the rule was ordered to be printed in the Record, as follows:

RULE 3—QUORUM FOR TAKING TESTIMONY OF WILLIAM A. BORDERS, JR., DURING RECESS

During the recess or adjournment of the Senate one member of the Committee shall constitute a quorum for the purpose of examination of Mr. William A. Borders, Jr., at which sworn testimony is heard and evidence taken.

The PRESIDING OFFICER. The question is on agreeing to the resolution.

The resolution (S. Res. 162) was agreed to.

The preamble was agreed to.

The resolution, with its preamble, are as follows:

S. RES. 162

Whereas William A. Borders, Jr., appeared before the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings ("Impeachment Trial Committee" or "Committee") on July 24 and 27, 1989, pursuant to the Committee's subpoena;

Whereas, on July 24, 1989, the Chairman of the Impeachment Trial Committee communicated to William A. Borders, Jr., an immunity order that had been issued by the United States District

Court for the District of Columbia pursuant to 18 U.S.C. §§ 6002 and 6005 (1982), but on July 24, 1989 and again on July 27, 1989, William A. Borders, Jr., refused to answer the Committee's questions to him about facts pertinent to the Articles of Impeachment;

Whereas under sections 703(b) and 705 of the Ethics in Government Act of 1978, 2 U.S.C. §§ 288b(b) and 288d (1988), the Senate Legal Counsel shall bring a civil action under 28 U.S.C. § 1365 (Supp. V 1987) to enforce a subpoena of a Senate committee when directed to do so by the adoption of a resolution by the Senate;

Whereas the Senate will have a continuing interest in the testimony of William A. Borders, Jr., until its final disposition of the Articles of Impeachment: Now, therefore, be it

Resolved, That the Senate Legal Counsel shall bring a civil action in the name of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings to enforce the Committee's subpoena to William A. Borders, Jr., and the Senate Legal Counsel shall conduct all related civil contempt proceedings.

SEC. 2. Until the final disposition by the Senate of the Articles of Impeachment against Judge Alcee L. Hastings, the Impeachment Trial Committee is authorized to continue this action to enforce the Committee's subpoena to William A. Borders, Jr., to hear his testimony, to report that testimony to the Senate, and to report to the Senate any further resolution for the civil or criminal enforcement of the Committee's subpoena to him.

Mr. MITCHELL. Mr. President, I move to reconsider the vote by which the resolution was agreed to.

Mr. DOLE. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

SUBMISSION, FOR PRINTING IN THE RECORD, OF RULES 1 AND 2 OF THE RULES OF PROCEDURE FOR THE IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS

[From the Congressional Record—Senate, June 7, 1989]

Mr. BINGAMAN. Mr. President, on May 17, 1989, the Impeachment Trial Committee on the Articles of Impeachment against Judge Alcee L. Hastings, adopted two rules to govern aspects of its pretrial proceedings.

The first rule, adopted pursuant to rule 26.7(a)(2) of the Standing Rules of the Senate, reduces to one member the committee quorum for taking sworn pretrial testimony. Judge Hastings and the House managers have asked to examine certain witnesses in advance of the committee's evidentiary hearings, which will begin on July 10, 1989. Although the pretrial examination of witnesses in a Senate impeachment proceeding is unprecedented, the committee has concluded that it should, in the circumstances of the present impeachment, permit a limited number of them. The rule implements the committee's determination that pretrial examinations may proceed before a quorum of one member. As with the impeachment proceedings concerning Judge Claiborne, the committee's evidentiary hearings will take place in the presence of a natural quorum of at least 7 of its 12 members.

The second rule provides that a pretrial procedural ruling by the chairman of the committee, in consultation with the vice chairman, shall be distributed to members of the committee. The ruling shall stand as the ruling of the committee, unless a member asks that a committee vote be taken on it. Senate impeachment rule XI grants to the chairman of an impeachment trial committee the power granted by impeachment rule VII to the presiding officer of the Senate to "rule on all questions of evidence including, but not limited to, questions of relevancy, materially, and redundancy of evidence and incidental questions." This power is subject to the right of any member to ask that a formal vote be taken.

Because pretrial rulings by the chairman, in consultation with the vice chairman, may occur between meetings of the committee, the committee concluded that there should be a rule providing for distribution of rulings to committee members. Any member of the committee may then ask for the convening of a meeting and for a vote on the matter. This rule does not delegate new authority to the chairman to rule on evidentiary and other questions, but assures that the committee will be able to exercise its power to review and revise the chairman's rulings.

I hereby submit those rules and ask that they be printed in the Record, as follows:

RULE 1—QUORUM FOR THE TAKING OF PRETRIAL TESTIMONY

One member shall constitute a quorum for the purpose of a pretrial examination of a witness at which sworn testimony is heard and evidence taken.

RULE 2—PROCEDURE FOR PRETRIAL DISPOSITION OF PROCEDURAL MATTERS

All rulings made by the chairman, in consultation with the vice chairman, on pretrial procedural matters shall be distributed to each member of the committee and, consistent with rules VII and XI of the Rules of Procedure and Practice in the Senate when sitting on impeachment trials, shall thereafter stand as the ruling of the committee, unless any member shall ask that a meeting be convened to consider and vote on any such ruling.

SUBMISSION, FOR PRINTING IN THE RECORD, OF RULE 3 OF THE RULES OF PROCEDURE FOR THE IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS

[From the Congressional Record—Senate, August 2, 1989]

Mr. BINGAMAN. Mr. President, on May 17, 1989, the Impeachment Trial Committee on the Articles of Impeachment Against Judge Alcee L. Hastings adopted two rules to govern aspects of its pretrial proceedings. Those rules were published in the Congressional Record on June 7, 1989.

An additional rule has been adopted by the Impeachment Trial Committee. This rule concerns the taking of testimony from Mr. William A. Borders, Jr., who was subpoenaed to appear as a witness by the Impeachment Trial Committee but has, to date, refused to testify. The committee has recommended that the Senate authorize a civil enforcement action at this time. It has advised Mr. Borders that although it anticipates that the taking of testimony of the parties' witnesses will be completed by August 4, 1989, it will be prepared to hear his testimony both during the August recess and thereafter. This rule implements the committee's decision that the taking of Mr. Borders' sworn testimony during the recess may proceed before a quorum of one member. Some or all of the other members of the committee may, of course, also be present.

I hereby submit that rule and ask that it be printed in the RECORD, as follows:

There being no objection, the rule was ordered to be printed in the RECORD, as follows:

RULE 3—QUORUM FOR TAKING TESTIMONY OF WILLIAM A. BORDERS, JR., DURING RECESS

During the recess of adjournment of the Senate one member of the Committee shall constitute a quorum for the purpose of examination of Mr. William A. Borders, Jr., at which sworn testimony is heard and evidence taken.

FILINGS IN THE FEDERAL COURTS BY THE PARTIES AND THE SENATE, AND RELEVANT JUDICIAL ORDERS IN *HASTINGS and NIXON* v. *UNITED STATES SENATE, et al.*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The Honorable **ALCEE L. HASTINGS**
United States District Judge,
301 N. Miami Avenue
Miami, Florida 33128
(305) 536-4289,
plaintiff,

v.

The **UNITED STATES SENATE**,
The **IMPEACHMENT TRIAL COMMITTEE**
Established Pursuant to
Senate Resolution 38, and
The Honorable **WALTER J. STEWART**
Secretary of the
United States Senate
Washington, D.C. 20510
(202) 224-2115; and
The Honorable **JOSEPH E. JENIFER**
as Acting Public Printer
of the United States
Government Printing Office
North Capitol & H Streets, N.W.
Washington, D.C. 20401
(202) 275-2034,
defendants.

GESELL, J. GAG

Civil Action

No. 89- 1602

JUN 1 1989

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

JURISDICTION

1. This is an action for declaratory and injunctive relief brought pursuant to 28 U.S.C. §§ 2201 and 2202 to protect and secure rights guaranteed to the plaintiff individually and as an article III judge by the Constitution of the United States. This court has jurisdiction under 28 U.S.C. § 1331 because the claims set forth arise under the Constitution of the United States.

VENUE

2. The causes of action and claims asserted in this action arise within the District of Columbia, and the Senate of the United States (the "Senate"); the Impeachment Trial Committee established pursuant to Senate Resolution 38 (the "Impeachment Trial Committee"); Walter J. Stewart, Secretary of the Senate; and Joseph E. Jenifer, Acting Public Printer of the United States are the party defendants. All defendants reside or have their official offices within the District of Columbia. Accordingly, the action is properly brought in this district under 28 U.S.C. § 1391(b).

NATURE OF THE PROCEEDINGS

3. This is an action to determine whether the Constitution has any meaning when senior officials in all three branches have resolved to drive or remove a maverick and disfavored judge from the federal bench. The Senate has decided to use a committee, an Impeachment Trial Committee, to retry in 1989 the criminal accusations on which the accused judge was tried and acquitted by a jury in 1983. The Impeachment Trial Committee has decided that the matter should be summarily tried before the *acquitted* judge has time and discovery to prepare his defense for trial comparable to that recently accorded a *convicted* judge before his impeachment. To that end, the Impeachment Trial Committee has imposed a burden-shifting mandatory stipulation process upon the accused judge and invited the prosecutors to use transcripts from other proceedings to reduce the time needed for

examination and the opportunities for cross-examination of witnesses at trial. To minimize plaintiff's role in the process further, the Impeachment Trial Committee has decided that the accused should not be afforded the funds he would need to participate meaningfully even in the summary proceedings it intends to conduct.

4. These and other actions taken would largely eliminate the cumbersome burdens incident to the proper trial of an impeachment. Moreover, they would avoid the risk that the attention demanded by a trial before the full Senate might reveal the truth and generate an outrage over the injustice that has been perpetrated on the plaintiff judge that could not be ignored. These actions, individually and in the aggregate, do not, however, comport with the requirements of the Constitution. The plaintiff judge brings this action to force the courts to confront the question whether expedient compliance with the will of the political forces aligned against him warrants the further departures from the principles upon which the Nation was founded that are now being implemented by the defendants.

5. The plaintiff in this action is the acquitted United States judge. He brings this action to prevent the Senate from retrying and readjudicating in 1989 the accusations on which a jury acquitted him in 1983. He also seeks to assure that the procedures employed by the Senate and the rights accorded him as the accused judge in the trial of such accusations as may be proper comport with the Constitu-

tion of the United States. Specifically, the plaintiff judge seeks a judgment declaring that the Constitution:

(a) precludes the use of impeachment to retry stale accusations on which the accused has been acquitted by the verdict of a jury following a criminal trial before the federal courts;

(b) requires that the full Senate sit for the trial of an impeachment and precludes the use of committees to receive evidence in the manner authorized by Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials ("Rule XI");

(c) requires that the Senate provide such funds and time as are necessary to assure that an accused judge may obtain the effective assistance of counsel and be accorded an opportunity to defend himself properly, and precludes the use of impeachment powers to deprive an article III judge of his compensation prior to trial and judgment by the Senate; and

(d) in any event, precludes the use of the special procedures that have been adopted for the trial of plaintiff's impeachment and the manner in which those procedures have been implemented to date.

6. The plaintiff judge also seeks preliminary and, if necessary, permanent injunctive relief to prevent the Senate and the Impeachment Trial Committee from:

(a) retrying accusations on which he was criminally prosecuted and tried and acquitted by a jury more than five years before the articles of impeachment were exhibited in the Senate;

(b) using and implementing Rule XI as an expedient to deprive an accused judge of rights guaranteed him by the Constitution, rather than confronting the need to amend the Constitution if such expedients are deemed necessary; and

(c) implementing procedures which can only serve to deprive the accused judge of his compensation in office and thereby to drive him from office without trial or, alternatively, to force him to defend himself under conditions that do not satisfy the essential requirements of fundamental fairness and due process embodied in our Constitution.

PARTIES

7. Plaintiff, the Honorable Alcee L. Hastings, is a United States District Judge for the Southern District of Florida. He was appointed in 1979 by the then-President of the United States, Jimmy Carter, after having been duly confirmed by the Senate.

8. The defendant Senate of the United States is one of the two houses of the Congress of the United States of America, the legislative branch of the United States government, and is charged under the Constitution of the United States with the sole power to try all impeachments.

9. The defendant Impeachment Trial Committee is a committee of twelve Senators to whom the Senate has delegated its power to receive evidence and conduct proceedings

in the case of impeachment brought by the United States House of Representatives (the "House") against the plaintiff judge.

10. Walter J. Stewart is the Secretary of the Senate. By virtue of that office, he is the person responsible for maintaining the records of the Senate and for making and controlling disbursements from the funds appropriated by the Senate, including funds in the contingent fund of the Senate.

11. Joseph E. Jenifer is the Acting Public Printer of the United States. By virtue of that office, he is the head of the Government Printing Office and is responsible for printing records, documents, reports, and orders for the Senate and its committees.

12. All defendants are sued only in their official capacities.

THE FACTS

13. In July 1981, officials in the United States Department of Justice (the "Justice Department") initiated an undercover operation to secure evidence that would enable them to prosecute Judge Hastings for high crimes and misdemeanors and thereby to secure his removal from the federal bench. The first phase of that operation ended on December 29, 1981, when attorneys for the Department filed an indictment that alleged that Judge Hastings had conspired with William A. Borders to solicit and accept a bribe from Thomas

and Frank Romano, who were defendants in a criminal case pending before Judge Hastings.

14. Judge Hastings promptly filed a motion to dismiss the indictment claiming that the Constitution required that accusations that an article III judge in active service had committed high crimes or misdemeanors in office be first submitted to the House and precluded the exercise of prosecutorial discretion and power by the executive and jurisdiction by the courts over such accusations unless and until the accused judge had resigned from office or had been impeached by the House and convicted and removed by the Senate. The district court denied that motion, but stayed further proceedings against the judge to permit him to appeal that decision.

15. The court of appeals rejected Judge Hastings's claim that the indictment must be dismissed, and the accusations were tried to a jury early in 1983. Judge Hastings testified and presented evidence at that trial. The prosecutors cross-examined him thoroughly and presented such additional evidence in rebuttal as they thought proper. In closing, the prosecutor expressly argued that the jury should find that Judge Hastings's testimony was false on every material point and should accept this as a further circumstance evidencing his participation in the conspiracy alleged in the indictment. On February 4, 1983, after full and careful deliberation, the jury returned a unanimous ver-

dict repudiating the government's case and finding the judge not guilty.

16. Six weeks later, on March 17, 1983, two of the three district-judge members of the Judicial Council of the Eleventh Circuit (the "Council"), acting on a request made by the then-chief judge of that circuit, filed a complaint against Judge Hastings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the "1980 Act"), Pub. L. No. 96-458, 94 Stat. 2035, *codified as amended at* 28 U.S.C. §§ 331, 332, 372(c), 604(h) (1982 & Supp. 1984). The complaint asked the Council, among other things, to substitute its judgment for that of the jury by investigating and determining that Judge Hastings was guilty of the crimes on which he had just been acquitted so that he could be certified for impeachment.

17. The then-chief judge of the circuit appointed himself and four other judges to serve as a special committee (the "Investigating Committee") to investigate the complaint. Thereafter, the Investigating Committee retained the Nation's best-known impeachment prosecutor as its principal investigator and chief counsel. The then-chief judge, without prior notice or consultation, promptly issued a news release announcing that the Investigating Committee had been established to investigate a complaint against Judge Hastings and naming the prominent impeachment prosecutor it had retained to aid them in securing their objectives.

18. Promptly after the then-chief judge had issued his unilateral news release, Judge Hastings submitted two requests. Pursuant to the 1980 Act, he asked the then-chief judge to join with him in agreeing that all records and proceedings of the Investigating Committee would be open to the public. Pursuant to the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 116(a), 96 Stat. 32 (1982), *codified at* 28 U.S.C. § 463 (1982), he asked the Administrator of the Office of the United States Courts to authorize payment of attorneys fees and expenses so that he could defend his conduct in office without further diminutions in his compensation as a judge. Both these requests were promptly denied.

19. In December 1983, Judge Hastings filed suit asking the courts to declare that the 1980 Act and the manner in which it had been implemented in the Eleventh Circuit and was being construed and applied in the proceedings against him were unconstitutional. After the appeal in that case had been argued, but before it had been decided, the Investigating Committee initiated its closed-door hearings to receive evidence gathered by its principal investigator and the FBI. Judge Hastings promptly filed a special appearance challenging the Investigating Committee's jurisdiction and declining to participate in any proceedings before it until his constitutional claims had been fully and finally adjudicated.

20. The Investigating Committee employed the resources of the judicial and executive branches for three-and-a-half years seeking new evidence against Judge Hastings. Its principal investigator, with extensive assistance from the FBI, conducted such *ex parte* investigations as the Investigating Committee thought necessary. These investigations produced no material evidence against the judge that had not been available to the prosecutors at the time they prosecuted the case in 1983. Nonetheless, the Investigating Committee conducted closed-door hearings on twenty-nine days scattered over a fifteen-month period at which its investigators presented such evidence as they thought might be marshalled into a more persuasive case against the judge. It has since been confirmed that evidence that was favorable to the judge was not developed or was affirmatively withheld from the record compiled at those hearings. By this procedure the Investigating Committee compiled a record that consisted of some 4880 pages of transcript and a voluminous collection of documentary exhibits.

21. On August 4, 1986, the Investigating Committee issued a 381-page report marshalling the evidence it had received to support its recommendation that the Council should find that the judge had been a guilty participant in the alleged 1981 conspiracy and that, as the prosecutors had argued, he had presented false testimony and fabricated evidence at his 1983 trial, notwithstanding the jury verdict exonerating him of these charges. The Investigating Commit-

tee did not, and the Council declined to, give Judge Hastings a copy of the report or the record upon which it was based. On September 4, 1986, the Council adopted the Investigating Committee's recommendations and certified the matter to the Judicial Conference of the United States (the "Conference").

22. The Conference also declined to supply Judge Hastings with a copy of the report and record. It did, however, permit his principal counsel to examine both. Based upon these examinations, counsel prepared *A Provisional and Preliminary Report on the Proceedings Against United States District Judge Alcee L. Hastings: 1981-86* (the "*Provisional Report*") analyzing the evidence and identifying specific defects and deficiencies in the investigation that had been conducted.

23. On January 17, 1987, Judge Hastings filed the *Petition of the Honorable Alcee L. Hastings, a United States District Judge for Redress of Grievances and Other Legislative Relief* (the "*Petition for Redress*"), accompanied by copies of the *Provisional Report*, with the House and with the Senate and delivered copies of both to the Conference. In the *Petition for Redress*, the judge expressly called upon the House and the Senate to take action to assure that he and all judges received reimbursement for funds necessarily expended in defending their conduct in office to assure that every judge could obtain the effective assistance of council without improper diminution of his or her compensation in

office. The *Petition for Redress* was promptly referred to the Committees on the Judiciary in the House and in the Senate.

24. The Conference met on March 17, 1987, and two hours later its members voted to concur in the findings of the Council. That afternoon the Conference issued and delivered a certificate to the Speaker of the House certifying its determination that Judge Hastings should be impeached.

25. The necessary resolution was introduced in the House, and the matter was referred to the House Committee on the Judiciary (the "Judiciary Committee") for the conduct of an impeachment inquiry. The Judiciary Committee referred the matter to its Subcommittee on Criminal Justice (the "Subcommittee") and retained special counsel and three assistant special counsel, with appropriate support staff, to aid the Subcommittee and Committee in the conduct of the inquiry.

26. Early in the inquiry, Judge Hastings asked that the Judiciary Committee and the Subcommittee pursue the lines of inquiry identified in the *Provisional Report* and asked that his counsel be permitted to assist in that aspect of its investigations to assure that the inquiry was complete. In his first request, he expressly asked that the Judiciary Committee refer his *Petition for Redress* to the Subcommittee so that the requests he made there, including the request that provision be made for reimbursement of fees and costs, might be considered with the inquiry. These re-

quests were rejected or ignored, and all the judge's other concerns were deferred pending the formal adoption of rules of procedure by the Subcommittee.

27. The Subcommittee never formally adopted rules of procedure. In April 1988, the chairman of the Subcommittee announced that hearings would begin in May. During the two weeks preceding those hearings, counsel for Judge Hastings were given only such materials as the Subcommittee thought proper and were given oral and ever-changing instructions by staff concerning the procedures the Subcommittee would observe during the hearings.

28. The procedures actually employed by the Subcommittee departed from established precedent and were designed to preclude effective participation by the judge. They were applied in a manner that substantially achieved that result. At the outset and throughout those hearings, plaintiff protested the departures and specified the unfair consequences that would, and did, flow from their application. The Subcommittee largely ignored these protests. The more substantial departures from precedent are described in the next paragraph.

29. The Subcommittee chose not to call or subject to cross-examination witnesses competent to testify concerning the accusations made in the Investigating Committee's report. Instead, it permitted the Investigating Committee's principal investigator and chief counsel to give a two-day hearsay account of the evidence that persuaded the Investi-

gating Committee that the judge was guilty, notwithstanding the jury's verdict acquitting him. Judge Hastings proffered a list of persons whose testimony was necessary to develop lines of inquiry identified in the *Provisional Report*. The Subcommittee refused to call any of these persons. The Subcommittee permitted Judge Hastings to make a ten-minute opening statement at the beginning of its proceedings and allowed his counsel fifteen minutes to make a closing statement at the end of its hearings.

30. On the basis of this inquiry, on July 17, 1988, the Subcommittee recommended that the Judiciary Committee approve and submit to the House seventeen articles of impeachment. On July 26, 1988, before the record compiled by the Subcommittee had been printed, the Judiciary Committee considered and approved the Subcommittee's recommendation. The Report of the Committee on the Judiciary was distributed on August 1, 1988, and, two days later, the House adopted the seventeen articles of impeachment now pending before the Senate.

31. Although included in its record, the Subcommittee made no recommendation with respect to requests made by plaintiff in the *Petition for Redress of Grievances*. The chairman of the Subcommittee did subsequently introduce a resolution that would have provided for the reimbursement of the costs and fees the inquiry had compelled plaintiff to bear. Action on that resolution and other efforts to pro-

vide such relief have, however, been deferred by the Judiciary Committee.

32. The first fifteen Articles of Impeachment adopted by the House and exhibited in the Senate make two central accusations -- that plaintiff participated in the corrupt conspiracy described in the 1981 indictment (Article I) and that he presented false testimony and fabricated evidence when he denied the allegations made in that indictment and provided innocent explanations for the circumstances the prosecutors had marshalled as evidence of his guilt at the 1983 trial (Articles II-XV). The government made and submitted those accusations to the jury in 1983. The jury necessarily decided and rejected those accusations when it returned its unanimous verdict finding plaintiff not guilty.

33. The last article of impeachment, Article XVII, is a catch-all article that accumulates and combines the accusations made in the first sixteen articles and presents and realleges them as a single and independent ground for impeachment and removal.

34. Plaintiff has properly presented to the Senate the claims now presented to this court by this action. He has fully exhausted all available means to obtain adequate and proper relief under the procedures established by the Senate generally for cases of impeachment as well as those adopted specially for his case of impeachment. The actions plaintiff has taken and the response of the Senate and its committees are described in the paragraphs that follow.

35. Plaintiff asserted in his Answer and Affirmative Defense to the Articles of Impeachment that the 1983 jury verdict acquitting him and the lapse of more than five years between that verdict and the House's decision to adopt and exhibit its Articles of Impeachment established a constitutional bar that precluded the use of impeachment to further prosecute or retry the accusations made in each of the first fifteen articles. Pursuant to Senate Resolution 39, these claims were presented by motion and fully briefed and argued before the full Senate. On March 16, 1989, the Senate voted to deny plaintiff's *Motion to Dismiss Articles I through XV Without Trial Based Upon 1983 Jury Verdict and Lapse of Time* in its entirety.

36. Plaintiff asserted in his Answer and Affirmative Defenses that Article XVII of the Articles of Impeachment failed to allege a high crime or misdemeanor within the meaning of Article II, Section 4 of the Constitution and so far departed from contemporary standards of fair pleading and practice as to make it impossible for the Senate to conduct a trial or render a judgment on that article that comported with the requirement of fundamental fairness embodied in the Constitution. Pursuant to Senate Resolution 39, this claim was presented by motion and fully briefed and argued before the full Senate. On March 16, 1989, the Senate voted to deny plaintiff's *Motion to Dismiss Article XVII*.

37. Plaintiff asserted his claim that Rule XI was unconstitutional early in proceedings conducted by the Sen-

ate's Committee on Rules and Administration (the "Rules Committee"). Moreover, and more emphatically, plaintiff asserted that Rule XI could not properly be invoked in a case of impeachment such as the one initiated by the Articles of Impeachment exhibited by the House against him because:

(a) The first fifteen articles made accusations that had been heard and rejected by a jury, and, if those accusations were to be retried, every Senator must execute his or her role by doing what the jurors did -- by hearing the testimony and observing the demeanor of the witnesses on direct and cross-examination and by considering the evidence and arguments as they were presented;

(b) Because each of the articles required an assessment of the credibility of the witnesses who testified concerning the accusations made and because fourteen of the articles accused the plaintiff of perjury, the Senate could not properly relieve itself of the burden of listening to the testimony of the witnesses and observing their demeanor on direct and cross-examination; and

(c) The nature of the accusations made in the articles were such that no Senator could properly execute in the case of impeachment against plaintiff the separate special oath to do impartial justice that each Senator is required to take in every case of impeachment, unless the trial were conducted before the full Senate.

38. The Rules Committee rejected these claims and recommended that an impeachment trial committee be appointed

pursuant to Rule XI to receive evidence and consider other matters in the event that the Senate denied plaintiff's motions to dismiss the Articles of Impeachment. On March 16, 1989, immediately after it had voted to deny plaintiff's motions to dismiss, the Senate adopted Senate Resolution 38 establishing the Impeachment Trial Committee and delegating to it a significant portion of the Senate's power to try impeachments. Pursuant to that resolution, the President *Pro Tempore* of the Senate appointed twelve Senators to serve as members of that committee.

39. Early in the proceedings before the Rules Committee, plaintiff asserted his claim that funds must be provided for his defense in order to prevent further and improper diminution of his compensation in office and in order to assure that he could obtain the effective assistance of counsel sufficient to enable him to fairly confront and defend himself against the articles being prosecuted by the House managers and their well-funded impeachment trial staff. Plaintiff pursued these claims before the Rules Committee. Although recognizing plaintiff's dilemma, the Rules Committee declined to make a recommendation on this claim, and the Senate took no action when it established the Impeachment Trial Committee.

40. On March 29, 1989, plaintiff filed a *Motion Requesting Funds for Respondent's Defense* with the Senate and submitted a copy to the Impeachment Trial Committee. At the request of the Impeachment Trial Committee, plaintiff sub-

mitted a financial statement showing that, as of April 1989, he had less than $10,000 available for his defense and that his estimated liability to attorneys for past services in connection with his defense of his office exceeded $2,000,000. On May 17, 1989, the Impeachment Trial Committee entered an order refusing to authorize or to recommend that the Senate authorize the provision of *any* funds for respondent's defense prior to the completion of the trial.

41. On September 30, 1988, the Senate adopted Senate Resolution 480 which, among other things, requested counsel for plaintiff and the managers for the House to seek stipulations with respect to facts not in dispute. On December 15, 1988, the House managers proposed voluminous stipulations concerning documents and factual allegations. Thereafter, the House managers proposed that the Rules Committee recommend and the Senate adopt a mandatory stipulation process under which any stipulation proposed by one party would be deemed admitted unless the other party not only objected, but also made a specific and adequate proffer showing the bases for that objection. Plaintiff promptly asserted his claim that the imposition of such a mandatory process upon an accused official in a case of impeachment would represent an unprecedented and unconstitutional imposition. The Rules Committee recommended that these issues be deferred until after plaintiff's motions to dismiss had been decided, and the Senate took no action on these questions when it established the Impeachment Trial Committee.

42. The House managers renewed their proposal for a mandatory process before the Impeachment Trial Committee. Plaintiff reiterated his objections, but also reiterated his willingness to participate in a proper stipulation process, after discovery was complete and he had been allowed time and resources sufficient to permit him to bring his trial preparation into rough parity with that enjoyed by the House and with that customarily granted to other officials prior to their impeachment by the House.

43. By order dated April 14, 1989, the Impeachment Trial Committee adopted the House proposal. Under that committee's present schedule, plaintiff must comply with the requirements of that procedure by June 1, 1989, notwithstanding the fact that even the limited discovery authorized by the Impeachment Trial Committee will not and cannot be completed by that date.

44. Early in the proceedings before the Rules Committee, plaintiff asserted that, after funds had been provided, he would need proper discovery and adequate time to prepare his defense and to redress the improper imbalance that had been created by the departures from precedent by the House Subcommittee in the conduct of the impeachment inquiry and by the procedures employed to prevent plaintiff from obtaining information and preparation comparable to that afforded other judges by the procedures observed in the conduct of other impeachment inquiries. In pursuing these claims, plaintiff has specifically called the Impeachment Trial Com-

mittee's attention to the procedures observed in the House in the impeachment inquiry into the conduct of convicted Judge Walter L. Nixon, Jr.

45. The House subcommittee responsible for the inquiry concerning Judge Nixon called the principal witnesses who had testified at the trial that had resulted in a jury verdict unanimously finding Judge Nixon guilty and permitted Judge Nixon's counsel to examine or cross-examine them fully. Moreover and more important, that House subcommittee called Reid H. Weingarten, the Justice Department trial attorney who had prosecuted both Judge Hastings and Judge Nixon and permitted Judge Nixon's counsel to cross-examine Mr. Weingarten fully concerning his conduct in the prosecution of Judge Nixon. Thereafter, that subcommittee suspended its proceedings in the *Nixon* inquiry for more than five months to permit Judge Nixon to pursue his claims that his conviction was tainted by impermissible prosecutorial conduct in the federal courts. It was then only after Judge Nixon had had a full opportunity to examine the witnesses against him and obtain discovery and develop evidence in support of his claims that the subcommittee ended its inquiry. It was on the record so developed that the subcommittee recommended and the House acted to impeach the convicted and incarcerated Judge Nixon.

46. Plaintiff has persisted in asserting before the Impeachment Trial Committee his claim that he must be allowed adequate time and discovery, and that committee has

taken action that has generated significant, but incomplete, discovery. In particular, plaintiff has asserted that an *acquitted* Judge Hastings must be afforded time and discovery *before trial* at least comparable to the time and discovery accorded a *convicted* Judge Nixon *before impeachment*. Indeed, the discovery provided to date has corroborated the validity of concerns that had been identified in the 1987 *Provisional Report* and has confirmed plaintiff's need for adequate time and further discovery.

47. The materials provided through discovery to date have established that due process violations and other improprieties occurred in the post-acquittal as well as the pre-trial investigations, violations of a kind and magnitude that require that most of the articles be dismissed and that plaintiff be accorded adequate time and further discovery to prepare for the trial of those that remain. The principal violations and irregularities identified to date include those described in the next three paragraphs of this complaint.

48. In 1985, the underworld figure who had acted in 1981 as a broker for William Borders's claimed ability to control and influence cases before federal judges, including Judge Hastings, told an FBI undercover agent that he believed that Judge Hastings was innocent and that Borders did not have any control or influence over the judge's decisions. The FBI reported this revelation to the Investigating Committee. The Investigating Committee's principal in-

vestigator and chief counsel advised the FBI that the Investigating Committee did *not* want this line of inquiry pursued. As a result of this instruction, the FBI terminated an investigation that might have provided additional, and perhaps conclusive, evidence of plaintiff's innocence. The underworld figure now has Alzheimers disease, and it is unlikely that this evidence could now be effectively sought or obtained.

49. At the outset of the 1981 undercover sting operation initiated to develop evidence against Judge Hastings, the Justice Department obtained material evidence that showed that Borders had made unfounded claims that he had the power to fix cases before federal judges in addition to Judge Hastings and that raised serious questions about the reliability of the information the informant had supplied to suggest that Judge Hastings was involved in Borders's corrupt scheme. The Justice Department, including the FBI, failed to act upon this information in conducting its investigation. Moreover, the government prosecutors not only improperly resisted Judge Hastings's efforts to prove that Borders had made his corrupt claims without foundation, but also falsely represented to the trial court that the informant, who could have established this defense, was not a material witness and that he should not be required to testify.

50. Prior to the Subcommittee hearings, the Subcommittee had obtained copies of an FBI telex written at the time

the FBI was seeking to induce the cooperation of the principal witness against the judge concerning the accusations made in Article XVI. This telex reported that the Justice Department had approved prosecution of this witness on criminal charges and recommended that this witness not be called before a grand jury at that time so that the FBI could maintain the leverage that the threat of such a prosecution could provide in inducing his cooperation against Judge Hastings.

51. During the hearings, the FBI's supervising agent in this investigation against Judge Hastings repeatedly testified that the FBI had not had any leverage to induce the witness's cooperation against Judge Hastings and specifically testified that there was no basis upon which the witness could have been prosecuted. Notwithstanding that testimony, the Subcommittee did not supply Judge Hastings with a copy of the telex and did not even insert it in the record of its inquiry until long after the hearings had ended and the Articles of Impeachment had been adopted by the House and exhibited in the Senate.

52. Plaintiff has brought each of the violations described in the foregoing paragraphs to the attention of the Impeachment Trial Committee in support of his demand for adequate time and discovery prior to trial. In view of the information produced by discovery, including that disclosed in paragraphs 50 and 51 above, he has expressly claimed that the *acquitted* Judge Hastings must now be afforded time and

discovery *before his trial* to develop his allegations concerning Mr. Weingarten and other Justice Department attorneys and FBI officials who directed and aided in the prosecution at least comparable to the time and discovery granted the *convicted* Judge Nixon *before his impeachment*.

53. Notwithstanding the developments described above, the Impeachment Trial Committee has established and persisted in maintaining a schedule that, if observed, would deprive plaintiff of the right to a fair trial and that would, indeed, reduce the trial of this impeachment to a constitutional travesty. Under that schedule, almost all of the time plaintiff's principal counsel in the case of impeachment can devote to trial preparation has been consumed in the preparation of pretrial docunents demanded by that schedule. That schedule has precluded counsel from properly completing his examination of the some 16,000 pages of significant documents delivered to him on April 26, 1989, as *part* of the House's discovery production, and has required him to frame plaintiff's objections and responses to the House's proposed stipulations before discovery is complete. Under that schedule, plaintiff would be required to submit his pretrial statement by June 21, 1989, and evidentiary hearings would begin on July 10, 1989. The demands imposed by this schedule could not fairly be met even if funds had been provided. In the absence of funds, the schedule and the costs it requires plaintiff to bear would effectively

deprive him of a fair trial by any standard and certainly by the standards mandated by the Constitution.

54. The Impeachment Trial Committee has also taken additional actions and entered orders that not only threaten plaintiff with the irreparable loss of fundamental rights guaranteed him by the Constitution, but also exceed even the authority the Senate purported to delegate to it by Senate Resolution 38. These actions and orders include those described in the three paragraphs that follow.

55. The Impeachment Trial Committee has improperly redelegated its power to decide pretrial matters to two of its members -- the chairman and vice-chairman of the committee. Those two members have exercised that power by making decisions and entering orders in the name of the Impeachment Trial Committee. As a result, plaintiff's rights in the pending impeachment are being effectively decided by two members of the Senate in consultation with staff and without the kind of debate and deliberation among Senators, in the absence of staff, that is and should be required by the judicial nature of the impeachment process and that has been and would be observed in the trial of impeachment before the full Senate.

56. The redelegation problem has recently been further compounded. The Senate has authorized and the Impeachment Trial Committee has retained a five-person special staff, including two special counsel, to aid in its work. As a result, substantive decisions are being made through delibera-

tion among temporary staff and two Senators that have deprived and will deprive plaintiff of substantial rights.

57. The Impeachment Trial Committee has determined that it will allot only three weeks to the presentation of evidence in this case of impeachment. That decision was made for the announced purpose of forcing parties to eliminate witnesses whose testimony would be relevant and material and inducing them instead to rely upon recorded testimony presented in other proceedings, proceedings in many instances at which plaintiff was neither present nor represented by counsel.

58. The proceedings in the Senate in the case of impeachment against plaintiff cannot be reconciled with the requirements established by the Constitution. Those proceedings have had, are having, and would have the effect of irreparably depriving plaintiff, as an individual and as an article III judge, of the most fundamental rights guaranteed him by the Constitution. If permitted to continue, those proceedings will establish a precedent that will undermine the integrity of the Constitution and the guarantees it established to promote and maintain the independence of the court. Those proceedings will continue and will have those effects, unless this court declares that they are contrary to the language, meaning, and intent of the Constitution and to the principles it embodies and, if necessary, acts to restrain the Senate from continuing to exercise its powers in the manner it has done to date.

59. Senate Resolution 38, as amended, authorizes the Secretary to pay the expenses of the Impeachment Trial Committee, including expenses for staff specially employed to assist it in its work, from the contingent fund of the Senate. That resolution directs the Impeachment Trial Committee to submit a certified transcript of the proceedings before it and authorizes it to submit a report to the Senate. Upon information and belief, the Impeachment Trial Committee will submit and, unless restrained, the Secretary will receive and file the certified transcript and the report. Upon information and belief, unless restrained, the Acting Public Printer will cause the record of the Impeachment Trial Committee's proceedings and any report it submits to be printed and distributed to the Senate members, and others as authorized by law.

COUNT ONE
(The 1983 Jury Verdict Bars a Trial on Articles I-XV)

60. Plaintiff incorporates the allegations made in paragraphs 1, 2, 7-15, 32, 34, 35, 58 and 59 of this complaint and restates them as the allegations of this paragraph.

61. The framers understood that cases of impeachment were criminal in nature and should be viewed as such, subject only to such exceptions as had been established to adapt them to their unique political function. They expressly embodied this understanding in our Constitution and expressly adopted such further exceptions and conditions as they deemed necessary to adapt the procedure to the form of

government they intended be established. The framers included an express exception to the principles of double jeopardy to permit the further prosecution of a "Party convicted." They did not include an exception for a party acquitted. After the Constitution had been adopted, the first Congress considered and rejected a proposal to create a general exception from the principles of double jeopardy for cases of impeachment.

62. The explicit provisions of the Constitution, the structure it established, and the settled common law jurisprudence it carried forward and that has developed under the Constitution bars the use of impeachment to reprosecute and retry accusations upon which an accused judge has previously been acquitted upon the verdict of a jury following criminal prosecution by the executive and trial before the courts.

63. *Autrefois acquit:* Prosecution by the House and trial by the Senate of the accusations made in the first fifteen articles of impeachment against plaintiff is barred, and this court should so declare.

COUNT TWO
(The House's Failure to Adopt Articles Within Five Years of the 1983 Jury Verdict Bars Trial on Articles I-XV)

64. Plaintiff incorporates the allegations made in paragraphs 1, 2, 7-16, 24-25, 30, 32, 34, 35, 58, and 59 of this complaint and restates them as the allegations of this paragraph.

65. The essential accusations made against plaintiff in the first fifteen articles of impeachment had been publicly made and the available evidence upon which they were based had been made part of the public record by February 4, 1983, the date on which plaintiff's trial ended with the jury's verdict acquitting him.

66. The Constitution and the principles of separation of powers it establishes do not permit the House to defer to other political branches for aid and advice in determining whether its sole power of impeachment should be exercised to re-examine and reprosecute accusations upon which an article III judge has been publicly tried and acquitted. Deferral affords officials in other branches political incentives that must undermine the security and independence of federal judges and, ultimately, the integrity of the assignment of the sole power of impeachment to the House. The resulting delay unnecessarily undermines the security of the acquitted judge in office and must prejudice his right to a fair trial the second time if the House does impeach him or her.

67. A delay that exceeds the maximum period that Congress has permitted for the prosecution of federal crimes must, in the case of an acquitted judge, so far undermine the required security and so far prejudice his right to a fair trial as to render a second prosecution and trial through impeachment impermissible. The delay between the jury's verdict and the adoption of the first fifteen articles exceeded five years. The Constitution precludes a sec-

ond trial in these circumstances, and this court should so declare.

COUNT THREE
(Plaintiff's Rights Were So Prejudiced in Fact by the Unnecessary Delay and the Conduct of the Post-Acquittal Investigations as to Preclude Trial on Articles I Through XV)

68. Plaintiff incorporates the allegations made in paragraphs 1, 2, 7-29, 31, 33, 34, 49, and 57 of this complaint and restates them as the allegations of this paragraph.

69. Between February 4, 1983, and August 3, 1988, witnesses with information material to the accusations against plaintiff have died, records have been lost and destroyed, and recollections have dimmed or been manipulated beyond repair. Moreover, during the post-acquittal investigations evidence favorable to the accused was ignored and not developed or preserved.

70. The delay in adopting and exhibiting the first fifteen articles of impeachment has so far prejudiced and impaired plaintiff's rights that it is no longer possible for the Senate to conduct a trial that comports with the requirements of fundamental fairness and due process mandated by the Constitution, and this court should so declare.

COUNT FOUR
(Article XVII Does Not Allege a Separate Offense and so far Conflicts with the Standards and Functions of Impeachment and Departs from Contemporary Notions of Fundamental Fairness and Due Process as to Preclude the Senate from Considering It)

71. Plaintiff incorporates the allegations made in paragraphs 1, 2, 7-12, 33, 34, 36, 58, and 59 of this

complaint and restates them as the allegations of this paragraph.

72. The framers rejected joint address as a procedure for removing officials from office and adopted impeachment for "Treason, Bribery, or other high Crimes and Misdemeanors" as the sole means by which the legislative branch might attack the behavior of an official in another branch of government. Article XVII of the Articles of Impeachment against plaintiff does not accuse him of a separate offense within that standard. A trial and conviction on that article would conflict with the purposes and functions for which the impeachment procedure was adopted, and this court should so declare.

73. Moreover, the use of a catch-all article that combines sixteen separate offenses into a single article represents an impermissible attempt to obtain the removal of an accused judge through cumulative voting and so far departs from the minimum requirements of fundamental fairness and due process as to preclude a trial or judgment, and this court should so declare.

COUNT FIVE

(The Senate May Not Delegate Its Responsibility to Try Impeachments to a Committee: Rule XI is Unconstitutional on its Face)

74. Plaintiff incorporates the allegations made in paragraphs 1, 2, 7-12, 34, 37, 38, 58, and 59 of this complaint and restates them as the allegations of this paragraph.

75. The Constitution requires that the full Senate sit for the trial of an impeachment. The Constitution imposes upon every Senator the duty to serve as both judge and juror, and those responsibilities cannot properly be delegated. The language conferring upon "The Senate . . . the sole Power to try all Impeachments" and requiring that "When sitting for the Purpose, they be upon Oath or Affirmation" give content to that requirement.

76. The constitutional requirement that the full Senate sit for the trial of an impeachment was confirmed and established by the practice and rules that the Senate observed for almost two hundred years in conducting such trials. The practice of the Senate in suspending the legislative and executive business during the conduct of trial proceedings is necessary to assure that no Senator may have proper excuse for failing to devote the time and attention necessary to execute fully the special oath each is required to take for the trial of every impeachment. The accused in any case of impeachment is entitled to insist that all the judges-jurors be available and have equally informed voices in deciding all fundamental issues that may arise during the course of the proceedings for the trial of an impeachment.

77. Rule XI and the Senate Resolution 38 conflict with the requirement that the full Senate sit for the trial of an impeachment and cannot be reconciled with the nature and functions that a proper trial of an impeachment must serve, and this court should so declare.

COUNT SIX
(Rule XI Cannot Constitutionally Be Applied to the Trial of the Impeachment Against Plaintiff)

78. Plaintiff incorporates the allegations made in paragraphs 1, 2, 7-12, 34, 37, 38, 58, and 59 of this complaint and restates them as the allegations of this paragraph.

79. Senate Rule XI cannot in any event be constitutionally applied in this case. The articles exhibited against plaintiff would require the Senate to redetermine issues that had been determined in plaintiff's favor by a jury and to determine whether plaintiff gave false testimony. These articles also require the judge-jurors to determine the credibility of the witnesses. Any procedure which deprives the accused of the opportunity to confront the witnesses against him and to present his testimony in the presence of the judges and jurors who will decide his guilt or innocence in circumstances such as these so far departs from the essential requirements of fundamental fairness and due process as to preclude its application, and this court should so declare.

COUNT SEVEN
(The Senate Must Provide Funds Sufficient to Enable an Accused Judge to Defend Himself at an Impeachment Trial Without Improper Diminution of His Compensation)

80. Plaintiff incorporates the allegations made in paragraphs 1, 2, 7-12, 16, 18, 23, 26, 31, 34, 39, 40, 53, 58, and 59 of this complaint and restates them as the allegations of this paragraph.

81. The Constitution guaranteed federal judges "a Compensation which shall not be diminished during their Continuance in Office." This guarantee was established to assure the people that other governmental officials could not undermine a judge's security and independence by depriving him or her of the emoluments of the judicial office. The financial burdens imposed by impeachments are such that no judge can properly be expected to defend his office unless funds are made available to enable him to meet those burdens without diminution of his or her compensation in office, and this court should so declare.

82. Plaintiff has no substantial source of funds other than the compensation he receives as an article III judge, and even that compensation would not be sufficient to enable him to defend himself in the trial of the pending impeachment. Moreover, if the Senate is correct in its view that impeachment is essentially a remedial process, as opposed to a criminal, process, then there can be no justification for permitting that process to be used to deplete a judge's compensation prior to the date of judgment.

COUNT EIGHT

(The Senate Must in Any Event Provide Funds Sufficient to Enable an Accused Judge to Obtain the Effective Assistance of Counsel and Meet the Other Costs Necessary to a Proper Defense)

83. Plaintiff incorporates the allegations made in paragraphs 1, 2, 7-12, 16, 18, 23, 26, 31, 34, 39, 40, 53, 58, and 59 of this complaint and restates them as the allegations of this paragraph.

84. An accused judge must in any event be afforded the means necessary to obtain the effective assistance of counsel and to meet the other costs necessary to a proper defense in the trial of an impeachment in which he or she is the respondent. Plaintiff lacks funds sufficient to obtain the effective assistance of counsel and meet the other costs necessary to his defense and has so shown the Impeachment Trial Committee. The decision of the Impeachment Trial Committee to deny his request for funds and defer consideration by the Senate until after the trial is complete and the failure of the Senate to act upon that request to date cannot be reconciled with the requirements imposed by the Constitution, and this court should so declare.

COUNT NINE

(The Mandatory Stipulation Process Constitutes Improper Burden Shifting, Was Beyond the Authority Delegated to the Impeachment Trial Committee, and, as Implemented, Would Deprive Plaintiff of the Right to a Fair Trial)

85. Plaintiff incorporates the allegations made in paragraphs 1, 2, 7-12, 34, 41-43, 47-53, 57, 58, and 59 of this complaint and restates them as the allegations of this paragraph.

86. The unprecedented imposition of a mandatory stipulation procedure, such as that adopted by the Impeachment Trial Committee, constitutes an impermissible attempt to shift the burden in the trial of an impeachment to the accused. Both the Constitution and established practice permit and require the House to allege such facts as it deems necessary to support its accusations in its articles of im-

peachment. The burden of the accused at the pre-trial stage is satisfied when a proper answer has been filed and the pleadings are settled. It is the settled pleadings that define the material facts in dispute, and the Senate may not further impose upon a respondent the duty to proffer evidence before trial at the price of having facts subsequently alleged by the House managers accepted as established without proof at trial.

87. The unprecedented imposition of the mandatory stipulation procedure adopted by the Impeachment Trial Committee has impermissibly interfered with plaintiff's ability to prepare for trial by forcing his counsel to focus upon the House's proposals prior to completion of discovery and during the limited period afforded for the preparation of his defense.

88. The procedure adopted was in any event beyond the authority conferred upon the Impeachment Trial Committee by Senate Resolution 38 and represents an improper attempt by that committee to arrogate unto itself the Senate's power to make binding determinations of fact. The perniciousness of this procedure is compounded and the constitutional defects in Senate Resolution 38 are further illustrated by the absence of any procedure by which plaintiff may insist that rulings such as these be considered and reviewed by the full Senate before evidentiary hearings begin.

COUNT TEN
(The Other Procedures Adopted and Actions Taken by the Impeachment Trial Committee Have Deprived Plaintiff of the Time Necessary to Prepare for Trial and Have Denied and Would Deny Him his Right to a Fair Trial)

89. Plaintiff incorporates the allegations made in paragraphs 1, 2, 7-12, 34, 37, 38, 40, 42-57, 58, and 59 of this complaint and restates them as the allegations of this paragraph.

90. The unprecedented procedures employed by the House subcommittee, and thereafter tacitly ratified by the House, resulted in an enormous, an unprecedented, and an unfair disparity in the materials and preparation available to the House and its managers and that available to plaintiff and his counsel at the time the Articles of Impeachment were adopted and exhibited in the Senate. The burdens imposed by the procedures adopted by the Senate fully consumed the time available to plaintiff and his counsel from that date until March 16, 1989, without allowing time or making provision for discovery sufficient to enable proper trial preparation.

91. The schedule established by the Impeachment Trial Committee, especially in light of information generated by the limited discovery provided to date, would preclude effective trial preparation by plaintiff in any event. The Impeachment Trial Committee's insistence on that schedule, after it received information showing the limitations upon the funds and resources available to plaintiff, represents an intentional effort to deprive him of a fair trial and must be construed as an act in excess of the powers the Sen-

ate could have conferred or intended to confer upon it by Senate Resolution 38.

92. The unprecedented decision of the Impeachment Trial Committee to prescribe limits on the time that would be allowed for the presentation of evidence at trial constitutes an impermissible attempt to arrogate unto itself powers that are not and could not be conferred upon it under the Constitution, Rule XI, or Senate Resolution 38 and represents an attempt to force respondent to accept pernicious standards of evidence and practice that have not been employed since the impeachment trial of Sir Walter Raleigh in 1603.

93. The unprecedented and unauthorized decision of the Impeachment Trial Committee to redelegate the powers conferred upon it to two of its members strips the proceedings of their judicial character and improperly converts them into proceedings that are legislative in character and, as has become traditional in that process, into proceedings which will be managed by appointed staff under the direction of the chairman and vice-chairman of the Impeachment Trial Committee.

94. The foregoing and other actions taken by the Impeachment Trial Committee have so far departed from the standards necessary for the proper trial of an impeachment and have so undermined the rights of the plaintiff as to constitute a direct and intolerable assault on the Constitu-

tion and the principles it embodies, and this court should so declare.

COUNT ELEVEN
(The Constitutional Travesty Must Be Brought to an End: What Has Been Done to Plaintiff Cannot Be Reconciled With the Standards Recognized Generally By Civilized Nations, Let Alone Those Mandated by our Constitution)

95. Plaintiff incorporates the allegations made in paragraphs 1 through 92 of this complaint and restates them as the allegations of this paragraph.

96. For seven years, seven months, and twenty-two days, plaintiff has been exposed to an unending and relentless attack by officials in all three branches determined to seek his removal from office. In the aggregate, those accusers have had available to them more than twenty years of properly compensated lawyer-time and the resources of the FBI and others to aid them in their quest. Throughout, plaintiff's requests for funds for his defense and for inquiries that were balanced have been denied, deferred, or simply ignored. Since 1983, the procedures employed by these officials have been designed to maximize the burdens upon the accused while minimizing the exposure of his accusers' conduct to public examination and scrutiny. The means employed by those officials to achieve their end cannot be reconciled with the minimum standards generally recognized by civilized nations as necessary to maintain the independence of the courts and to assure that the essential requirements of fairness are satisfied before an individual is deprived of fundamental rights. *A fortiori*, they cannot

be reconciled with those mandated by the Constitution of these United States.

97. In prior actions brought by and against plaintiff, the federal courts have used techniques of fragmentation and avoidance to allow the political railroad train to gather momentum and proceed to its foreordained destination without interference. Plaintiff has and will remain on the tracks, but he stands there surrounded by fundamental principles and carrying the remnants of those that have been broken or damaged to date. Absent intervention by this court, the train will speed rapidly to its destination. It will, however, have to crush principles in order to crush the man. Plaintiff can abide the result; the question presented here is, "Can the Constitution?"

PRAYER FOR RELIEF

Wherefore plaintiff requests that this court enter judgment declaring that:

1. The 1983 jury verdict acquitting plaintiff, the lapse of more than five years between the date of that verdict and the date on which the articles impeaching plaintiff were adopted, and/or the prejudice-in-fact to plaintiff that resulted during that delay establish a constitutional bar that precludes the Senate from conducting a trial on the first fifteen articles in the Articles of Impeachment exhibited against plaintiff;

2. Article XVII of the Articles of Impeachment exhibited against plaintiff fails to allege a high crime or mis-

demeanor within the meaning of the Constitution and represents an attempt to invoke cumulative voting that is inconsistent with the constitutional function of impeachments and that fails to satisfy the minimum standards of fundamental fairness and due process mandated by the Constitution;

3. Senate Rule XI is unconstitutional on its face or, alternatively and in any event, that Rule XI cannot constitutionally be applied in the manner authorized by Senate Resolution 38 in the case of impeachment against plaintiff to deprive plaintiff of his right to a full, fair and complete trial before the Senate in which he may insist that all Senators execute their special oaths to do impartial justice in all matters pertaining to the case of impeachment against him;

4. The Senate may not exercise its power to try impeachments in a manner that diminishes the compensation of an article III judge in office prior to judgment and may not, in any event, proceed to trial unless and until the plaintiff judge has been provided funds sufficient to enable him to obtain the effective assistance of counsel and to pay the other costs necessary to a full and fair defense; and

5. The orders entered and the actions taken by the Impeachment Trial Committee exceed the authority delegated to it by Senate Resolution 38 and the authority that could be delegated to it under the Constitution and cannot be reconciled with the requirement of fundamental fairness and due

process that the Constitution requires be observed in the trial of an impeachment.

Plaintiff further requests that this court enter:

1. A preliminary injunction to maintain the *status quo* and to prevent the Senate, the Impeachment Trial Committee, and any of their members, officers, or employees from taking further actions that may irreparably injure or deprive plaintiff of rights guaranteed him by the Constitution by virtue of his status as a citizen and an article III judge prior to final judgment in this case;

2. A permanent injunction, if and to the extent necessary to give full and proper effect to the rights plaintiff holds and is declared to hold in this action and to assure that the exercise of the Senate's jurisdiction and power in this case of impeachment conform to the essential requirements established by the Constitution;

3. Preliminary and, if necessary, permanent injunctions enjoining:

(a) the Secretary and those acting under his direction and control from (i) disbursing or approving the disbursement of funds to pay expenses incurred by the Impeachment Trial Committee or compensation for its staff and (ii) from receiving, filing, or recording any records, transcripts, orders, or reports from the Impeachment Trial Committee or, with respect to Articles I through XV and Article XVII, from the Senate; and

(b) the Acting Public Printer and those acting under his direction or control from printing or distributing any records, transcripts, orders or reports submitted by or on behalf of the Impeachment Trial Committee or, with respect to Articles I through XV and Article XVII, by or on behalf of the Senate.

4. Such other and further orders as may be necessary and proper to afford plaintiff all relief necessary to do full justice in the case.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The Honorable ALCEE L. HASTINGS
United States District Judge,

Plaintiff,

v.

The UNITED STATES SENATE,
The IMPEACHMENT TRIAL COMMITTEE,
Established Pursuant to
Senate Resolution 38,
The Honorable WALTER J. STEWART,
Secretary of the
United States Senate, and
The Honorable JOSEPH E. Jenifer,
as Acting Public Printer
of the United States,

Defendants.

CIVIL ACTION
No. 89-1602

(Gesell, J.)

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff, the Honorable Alcee Lamar Hastings, respectfully moves that this Court enter a preliminary injunction granting him the limited relief described below. The grounds supporting this motion are set forth in the accompanying Plaintiff's Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction. To be effective relief must be granted before July 10, 1989. Plaintiff requires an oral hearing on this motion at the Court's earliest convenience.

The Senate has decided to use an Impeachment Trial Committee to retry in 1989 the criminal accusations on which the plaintiff judge was acquitted by a jury in 1983. The Impeachment Trial Committee has decided that the matter should be similarly tried before the acquitted judge has time and discovery to prepare his -

defense for trial comparable to that recently accorded a convicted judge before his impeachment. To that end, the Impeachment Trial Committee has imposed a burden-shifting mandatory stipulation process upon the accused judge and invited the House prosecutors to use transcripts from other proceedings to reduce the time needed for examination and the opportunities for cross-examination of witnesses at trial. To minimize plaintiff's role in the process further, the Impeachment Trial Committee has decided that the accused should not be afforded the funds he would need to participate meaningfully even in the summary proceedings it intends to conduct.

The Impeachment Trial Committee has decided that its summary evidentiary hearings should begin on July 10, 1989. In the interim, it has decided that two Senators, its chairman in consultation with its vice-chairman, may conduct such pre-trial proceedings and decide such issues as they deem proper without the presence or deliberation of the full committee. The actions taken to date have irreparably injured plaintiff's rights. If relief is not granted before the evidentiary hearings begin, further injuries will accrue that may make it impossible for the Senate to conduct a fair or proper impeachment trial on any of the accusations before it.

Plaintiff believes that the Senate and its members will honor the spirit as well as the letter of any order entered by this Court. Accordingly, at this time he asks only that the Court enter a preliminary injunction enjoining:

(a) the Secretary and those acting under his direction and control from (i) disbursing or approving the disbursement of funds to pay expenses incurred by the Impeachment Trial Committee or compensation for its staff and (ii) from receiving, filing, or recording any records, transcripts, orders, or reports from the Impeachment Trial Committee or, with respect to Articles I through XV and Article XVII, from the Senate; and

(b) the Acting Public Printer and those acting under his direction or control from printing or distributing any records, transcripts, orders, or reports submitted by or on behalf of the Impeachment Trial Committee or, with respect to Articles I through XV and Article XVII, by or on behalf of the Senate.

Plaintiff reserves the right to seek such other and further orders as may be necessary to implement this court's decision if his view of response by the Senate and the Impeachment Trial Committee to the limited injunction sought here proves to be incorrect. A proposed order is attached.

Respectfully submitted,

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Attorneys for United States District Judge Alcee L. Hastings

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The Honorable **ALCEE L. HASTINGS** U.S. District Judge, Plaintiff, v. The **UNITED STATES SENATE**, The **IMPEACHMENT TRIAL COMMITTEE**, Established Pursuant to Senate Resolution 38, The Honorable **WALTER J. STEWART** Secretary of the United States Senate, and The Honorable **JOSEPH E. JENIFER** as Acting Public Printer of the United States, Defendants.	Civil Action No. 89-1602 (Gesell, J.)

PRELIMINARY INJUNCTION

UPON CONSIDERATION of Plaintiff's Motion for Preliminary Injunction, defendants' Opposition thereto, and the entire record herein, it is by the Court this _______ day of _____________, 1989 ORDERED that

(a) the Secretary and those acting under his direction and control from (i) disbursing or approving the disbursement of funds to pay expenses incurred by the Impeachment Trial Committee or compensation for its staff and (ii) from receiving, filing, or recording any records, transcripts, orders, or reports from the Impeachment Trial Committee or, with respect to Articles I through XV and Article XVII, from the Senate; and

(b) the Acting Public Printer and those acting under his direction or control from printing or distributing any records, transcripts, orders, or reports submitted by or on behalf of the Impeachment Trial Committee or, with respect to Articles I through XV and Article XVII, by or on behalf of the Senate.

This Order shall expire at the time this Court enters an Order finally and completely disposing of Plaintiff's Motion for Summary Judgment, unless further extended by Order of this Court.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The Honorable ALCEE L. HASTINGS,
United States District Judge,
301 N. Miami Avenue
Miami, Florida 33128
(305) 536-4289,

Plaintiff,

WALTER L. NIXON, JR.,
1204 Iola Road
Ocean Springs, MS 39564
(601) 875-2082,

Applicant-for-Intervention,

v.

The UNITED STATES SENATE,
The IMPEACHMENT TRIAL COMMITTEE
Established Pursuant to
Senate Resolution 38, and
The Honorable WALTER J. STEWART
Secretary of the
United States Senate
Washington, D.C. 20510
(202) 224-2115; and
The Honorable JOSEPH E. JENIFER
as Acting Public Printer
of the United States
Government Printing Office
North Capitol & H Streets, N.W.
Washington, D.C. 20401
(202) 275-2034,

Defendants.

FILED
JUN 14 1989
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action

No. 89-1602

(Gesell J.)

COMPLAINT OF WALTER L. NIXON, JR. FOR DECLARATORY JUDGMENT

This action seeks a declaratory judgment that Rule XI of the Impeachment Rules of the United States Senate unconstitutionally authorizes the use of a committee of twelve senators to receive all evidence in an impeachment proceeding.

JURISDICTION

1. This is an action for declaratory relief under 28 U.S.C. §§ 2201 and 2202. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 because the claims set forth arise under the Constitution.

VENUE

2. Venue is established in the District of Columbia under 28 U.S.C. § 1391(b) because all of the defendants reside or have their official offices within the District of Columbia, and conduct their business within the District of Columbia.

PARTIES

3. Applicant-for-intervention Walter L. Nixon, Jr. is the Chief Judge of the United States District Court for the Southern District of Mississippi, having been appointed by the President and confirmed by the Senate in 1968.

4. Plaintiff Alcee L. Hastings is a United States District Judge for the Southern District of Florida.

5. The defendant Senate of the United States is charged by the Constitution with the sole power to try all impeachments.

6. The defendant Impeachment Trial Committee is a group of twelve Senators appointed by the Senate to receive

evidence and conduct impeachment proceedings against plaintiff Hastings ("the Hastings Committee").

7. Walter J. Stewart is Secretary of the Senate, and is responsible for maintaining the records of the Senate and for making and controlling disbursements of funds appropriated for the business of the Senate, including funds in the contingent fund of the Senate.

8. Joseph E. Jenifer is the Acting Public Printer of the United States, and thereby is responsible for printing records, documents, reports, and orders for the Senate and its committees.

9. All defendants are sued only in their official capacities.

BACKGROUND

10. Until 1986, all Senate evidentiary hearings in impeachment cases were conducted on the floor of the Senate, in full view and hearing of the entire membership of the Senate.

11. Under the Constitution, applicant-for-intervention Nixon may be removed from office only pursuant to impeachment as provided in Article II, Section 4 of the Constitution.

12. On May 10, 1989, the House of Representatives adopted three Articles of Impeachment against applicant-for-intervention Nixon and appointed five congressmen to present those Articles to the Senate ("the House Managers"). The

Articles of Impeachment allege that Nixon made false statements to a grand jury and federal officials in 1984.

13. The Articles of Impeachment against Nixon charge him with making false statements, and thus concern in large part matters of the credibility of witnesses in the context of documentary and other factual evidence. Nixon was convicted in 1986 in the Southern District of Mississippi on two counts asserting similar allegations, but continues to assert his innocence in every respect.

14. The credibility of the witnesses in Nixon's case is particularly important. One major prosecution witness has recanted his former testimony against Nixon and has said he gave false testimony to please the government. A second key prosecution witness has admitted to giving false testimony under oath on several occasions. Nixon's motion for a new trial based on these and other issues is currently on appeal to the Fifth Circuit.

15. On May 11, 1989, the Articles of Impeachment were exhibited in the Senate and the Senate adopted Senate Resolution 128, which, pursuant to Rule XI of the Senate Impeachment Rules:

(a) Appointed a committee of twelve Senators ["Nixon Committee"] "to receive and report evidence with respect to articles of impeachment against Judge Walter L. Nixon, Jr." The Nixon Committee is authorized to submit to the Senate a "certified copy of the transcript of the proceedings and testimony had and given before it," and also to "report to the Senate a statement of facts and a summary . . . of evidence that the parties have introduced on the contested issues of fact." (None of the members of the Nixon Committee serve on the Committee named in Judge Hastings' Complaint as a defendant in this action.)

(b) Authorized the disbursement by defendant Stewart from the contingent fund of the Senate of all funds necessary for the business of the Nixon Committee.

(c) Authorized the printing by defendant Jenifer of all testimony, reports or other materials generated by the Nixon Impeachment Committee.

16. The Nixon Committee held an organizational meeting on May 16, 1989, and elected a Chair and Vice-Chair. On June 1, 1989, the Chair and Vice-Chair of the Nixon Committee met with the House Mangers and counsel for applicant-for-intervention Nixon.

17. The Nixon Committee has established a prehearing schedule for discovery and preparation of motions, and also has scheduled all evidentiary hearings in the impeachment proceedings to begin September 6.

18. No provision has been made for the presentation to the full Senate of any evidentiary or legal matter relating to the Articles of Impeachment against Nixon.

19. In the Senate impeachment proceedings concerning Judge Hastings, all evidentiary hearings are to occur before the Hastings Committee, and not before the full Senate.

CLAIM
(Article I, Section 3, Clause 6 Of The Constitution)

20. The Constitution provides that the Senate shall have "the sole Power to try all Impeachments," and that "when sitting for the Purpose, they be upon Oath or Affirmation."

21. The members of the Senate took an oath on May 11, 1989, to "do impartial justice according to the Constitution and laws" in the impeachment proceeding concerning Nixon. The one hundred members of the Senate are both judges and jurors in that proceeding.

22. Nevertheless, by Impeachment Rule XI and Resolution 128, the Senate has delegated to the Nixon Committee the hearing of all evidentiary matters, thereby assuring that eighty-eight senators, or more than seven-eighths of that body, will neither hear nor see the witnesses during the trial and will play no role in determining the procedures to be followed.

23. Because Impeachment Rule XI and Senate Resolution 128 thereby exclude more than seven-eighths of the Senate from hearing the witnesses and the evidence in this case,

they are contrary to the direction in Article I, section 3, clause 6 of the Constitution that the Senate shall try all impeachments.

PRAYER FOR RELIEF

WHEREFORE, applicant-for-intervention Nixon requests that this Court enter judgment declaring that Senate Impeachment Rule XI and Resolution 128 are unconstitutional in that they deny Nixon a trial before the Senate, as provided in Article I, section 3, clause 6 of the Constitution, and thereby abrogate the Senate's constitutional responsibility to try all impeachments.

Respectfully submitted,

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Attorneys for Applicant-for-Intervention
Walter L. Nixon, Jr.

Date: June 14, 1989

DOSCMPLT.NX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The Honorable ALCEE L. HASTINGS, Plaintiff;	
WALTER L. NIXON, JR., Applicant-for-Intervention,	Civil Action No. 89-1602
v.	(Gesell, J.)
The UNITED STATES SENATE, et al., Defendant.	

MOTION OF WALTER L. NIXON, JR. TO INTERVENE

Pursuant to Rules 24(a) and (b) of the Federal Rules of Civil Procedure, Walter L. Nixon, Jr., Chief Judge of the United States District Court for the Southern District of Mississippi, hereby seeks leave to intervene in this action as a party-plaintiff. In support of this motion, Nixon states the following:

1. He is currently facing impeachment proceedings in the United States Senate, and the evidentiary portion of those proceedings has been delegated to a special committee of twelve senators, in violation of Article I, section 3, clause 6, of Article III, and of the Fifth Amendment of the Constitution.

2. In this action, plaintiff Hastings has raised eleven claims, including one claim closely related to the claims presented by applicant-for-intervention Nixon, concerning the use of a special committee of twelve senators to conduct all evidentiary proceedings in the impeachment proceedings against him.

3. Under Rule 24(a), the disposition of plaintiff Hastings' claims on the use of a committee to receive evidence in his case will as a practical matter impair or impede Nixon's ability to protect the rights he now asserts.

4. Under Rule 24(b), the claims by plaintiff Hastings and by applicant-for-intervention Nixon concerning the use of a committee to receive all evidence on behalf of the Senate also present a common question of law.

5. Because plaintiff Hastings has presented a number of claims which we do not present, and because plaintiff Hastings' claims concerning the use of an evidentiary committee are different in some respects from our claim, plaintiff Hastings may not be an adequate representative of Nixon under Rule 24(a).

6. The claim we seek to raise will not complicate or prolong this proceeding, as it concerns basic questions of law and should not involve disputed issues of fact.

For all of the foregoing reasons and the reasons set forth more fully in the accompanying memorandum in support of this motion, intervention should be granted.

Respectfully submitted,

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Date: June 14, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The Honorable ALCEE L. HASTINGS, Plaintiff;	Civil Action
WALTER L. NIXON, JR., Applicant-for-Intervention,	No. 89-1602
v.	(Gesell, J.)
The UNITED STATES SENATE, et al., Defendant.	

MEMORANDUM IN SUPPORT OF WALTER L. NIXON, JR.'S MOTION TO INTERVENE

Walter L. Nixon, Jr. seeks to intervene in this case in order to ensure efficient and complete resolution of the constitutional issues surrounding the use of a committee of twelve senators to hear all evidence during impeachment proceedings. Our claim concerns only one of the matters presented by Judge Hastings in this action: the constitutionality of Senate Impeachment Rule XI, which allows the use of a committee of twelve senators for evidentiary matters. Because there is no reason to multiply lawsuits on that issue -- and because there is good reason for the issue to be decided only once and in a single action -- we seek to intervene as a matter of right under Rule 24(a) and through the exercise of this Court's discretion under Rule 24(b).

A. Intervention Of Right Under Rule 24(a)

Rule 24(a)(2) provides that a party has a right to intervene in pending litigation when he "claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

This rule has been reduced to four criteria: (Foster v. Gueory, 655 F.2d 1319, 1324 (D.C. Cir. 1981)): (1) the motion to intervene must be timely filed; (2) the applicant's interest in the action should be construed to "involv[e] as many apparently concerned persons as is compatible with efficiency and due process"; (3) whether a decision in the case may as a practical matter impede the applicant in protecting his interest concerns the potential stare decisis effect against the applicant of a decision in the pending action; and (4) whether the applicant's interest "may" be inadequately represented by the current parties. See Cook v. Boorstin, 763 F.2d 1462 (D.C. Cir. 1985); United States v. American Tel. & Tel. Co., 642 F.2d 1285 (D.C. Cir. 1980); Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967). Nixon plainly satisfies those standards in this case.

1) Timeliness -- This action was filed on June 1, 1989, and our motion to intervene was filed less than two

weeks later, before any court hearing in the lawsuit. By any standard, the motion to intervene was timely.

2) Interest In The Litigation -- Count V of Judge Hastings' Complaint challenges the constitutionality of Senate Impeachment Rule XI with respect to the use of a committee of twelve senators to receive evidence in the impeachment proceeding. Our Complaint challenges the same feature of Senate Impeachment Rule XI on very similar, though not identical, grounds. Because the impeachment proceedings concerning Nixon are to be conducted under Rule XI, with a Committee of twelve senators hearing all evidence, Nixon plainly has an interest in the constitutionality of Rule XI.

3) Practical Impairment Of The Interest -- Should Judge Hastings fail in his constitutional challenge to Senate Impeachment Rule XI, any similar claim by Nixon might be rejected under stare decisis. Accordingly, Nixon's interest in challenging the constitutionality of Rule XI "may as a practical matter" be impeded if he is not permitted to intervene in the lawsuit.

4) Inadequate Representation -- An applicant for intervention must carry only a "minimal" burden of showing that representation of his interest by existing parties "may" be inadequate. Dimond v. District of Columbia, 792 F.2d 179, 193 (D.C. Cir. 1986); Natural Resources Defense Council v. Costle, 561 F.2d 904, 912-13 (D.C. Cir. 1977). The Court of Appeals has stressed "the need for a liberal application [of

this requirement] in favor of permitting application." Nuesse v. Camp, supra, 385 F.2d at 702.

In this case, Judge Hastings has presented a number of claims in addition to the issues we raise, and thus he may well have different tactical and strategic priorities in the conduct of the litigation or possible appeals. Such a divergence of tactical priorities has been held to satisfy the minimal burden of showing the possibility of inadequate representation by existing parties under Rule 24(a). Nuesse v. Camp, supra, 385 F.2d at 703. Moreover, Judge Hastings' Complaint makes statements about Nixon's situation which suggest adversariness between the interests of Judge Hastings and Nixon. E.g., Hastings Complaint, ¶ 45.

B. Permissive Intervention Under Rule 24(b)

Under Rule 24(b), intervention may be granted in this Court's discretion when "an applicant's claim or defense and the main action have a question of law or fact in common," so long as the intervention will not "unduly delay or prejudice the adjudication of the rights of the original parties."

There is no basis for concern that Nixon's intervention would unduly expand or complicate this lawsuit. Arizona v. California, 460 U.S. 605 (1983); Woodward v. DiPalermo, 98 F.R.D. 621 (D.D.C. 1983). The essential claim that we present is already raised in this action, and concerns purely legal issues, not involving any significant fact-finding. Accordingly, intervention should not create any additional delay or expense for any party. Indeed, intervention will ensure that the issues are resolved more efficiently and completely than would result if Nixon were denied intervention and had to file a separate action challenging the use of a committee to receive evidence under Senate Impeachment Rule XI.

CONCLUSION

For all of the foregoing reasons, this Court should grant the Motion to Intervene under either Rule 24(a) or Rule 24(b).

Respectfully submitted,

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Date: June 14, 1989

DOSNTRVE.NX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ALCEE L. HASTINGS,

Plaintiff,

v.

UNITED STATES SENATE, ET AL.,

Defendants.

Civil Action No. 89-1602

FILED

JUN 14 1989

Clerk, U.S. District Court
District of Columbia

ORDER

Upon consideration, in open court this day, of the motion of Walter L. Nixon, Jr. to intervene in this action as a party plaintiff, and with the consent of the parties, it is hereby

ORDERED that the motion to intervene is granted pursuant to Federal Rules of Civil Procedure 24(b), and Walter L. Nixon, Jr. may participate as a party plaintiff in this action in respect of his claim to an impeachment trial before the full body of the Senate, on condition he adheres to all dates scheduled in the original case.

UNITED STATES DISTRICT JUDGE

June 14, 1989.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ALCEE L. HASTINGS

Plaintiff,

WALTER L. NIXON, JR.,

Intervening
Plaintiff,

v.

UNITED STATES SENATE, the
IMPEACHMENT TRIAL COMMITTEE,
Established Pursuant to
Senate Resolution 38,
WALTER J. STEWART,
Secretary of the United
States Senate, and
JOSEPH E. JENIFER as
Acting Public Printer of
the United States
Government Printing Office,

Defendants.

Civil Action No. 89-1602

FILED

JUL 5 1989

Clerk, U.S. District Court
District of Columbia

ORDER

For the reasons stated in the attached Memorandum, the defendants' motions to dismiss are granted and the complaints of plaintiff Alcee L. Hastings and intervenor Walter L. Nixon, Jr. are hereby dismissed. The plaintiffs' motions for preliminary injunctions are each hereby denied.

SO ORDERED.

July 5, 1989

Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALCEE L. HASTINGS)
)
Plaintiff,)
)
WALTER L. NIXON, JR.,)
)
Intervening)
Plaintiff,)
)
v.) Civil Action No. 89-1602
)
UNITED STATES SENATE, the)
IMPEACHMENT TRIAL COMMITTEE,)
Established Pursuant to)
Senate Resolution 38,)
WALTER J. STEWART,)
Secretary of the United)
States Senate, and)
JOSEPH E. JENIFER)
as Acting Public)
Printer of the United)
States Government Printing)
Office,)
)
Defendants.)

FILED
JUL 5 1989
Clerk, U.S. District Court
District of Columbia

MEMORANDUM

At the eleventh hour United States District Judge Alcee L. Hastings seeks by this complaint to stop his impeachment proceedings in the United States Senate which are scheduled to commence July 10, 1989. Judge Hastings contends that the contemplated impeachment hearing is procedurally flawed because a committee is being used as part of the process. This, he contends, will deny him due process because the trial will not be conducted entirely before the full body of the Senate, which he urges is required by Article I, Section 3 of the Constitution. District Judge Walter L. Nixon, Jr. has intervened in support of this primary claim, having demonstrated that he, too, will face similar impeachment hearings in the Senate later in the fall. As each judge well knows the Senate as an entity cannot be effectively sued. Therefore, Judge Hastings also asks that the individual defendants who would normally implement impeachment proceedings be preliminarily enjoined. All defendants have responded by a single motion to dismiss. All motions are elaborately documented and there has been full argument by all parties. The Court has consolidated aspects of the preliminary injunction motion with a hearing on the merits pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure.

Judge Hastings' complaint also advances other claims. He contends that the Senate is violating his 5th Amendment double jeopardy rights, because a jury previously acquitted him of some charges the Senate will be considering. He urges that he is being denied effective assistance of counsel and that the Senate has unconstitutionally diminished his pay because it has not provided attorney's fees for his defense. He also seeks to block the committee's efforts to receive a stipulation of uncontested facts and documents. All these claims boil down to what is essentially a charge that the Senate is violating his due process rights to a fair trial by trying him in the first place and by subjecting him to the committee process in the second.

The Court has jurisdiction to hear at least the constitutional aspects of Judge Hastings' complaint under its general federal question jurisdiction, 28 U.S.C. § 1331.

Rule XI:

Judge Hastings' impeachment proceedings are governed by Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, which the Senate adopted in 1935. The Senate passed implementing rules by Resolution for this specific trial, acting on recommendations from the Rules Committee, which considered various fair trial aspects of the case. Impeachment Rule XI authorizes the appointment of a Senate Committee "to receive evidence and take testimony" and to "report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee." S. Doc. No. 101-3, 101st Cong., 1st Sess. 15 (1989). The report issued by the committee to the Senate will not make conclusions or recommendations to convict or acquit on each Article, but will be more in the nature of a neutral summary. The Rules Committee recommendations provide that the entire committee hearing will be taped. It will be broadcast to each Senator's office. Senators may replay the tape at any time for any purpose such as to evaluate the demeanor of witnesses whose credibility may be placed in issue. S.Rep. No. 101-1, 101st Cong., 1st Sess. 112 (1989). The Senate trial is scheduled so as to give Senators not on the committee approximately one month to read the report and review any tapes or evidence they wish to consult before taking the requisite oaths and voting on impeachment.

The Committee format has not prevented full participation by the Senate. The Senate as a whole fully heard Judge Hastings' motions to dismiss. 135 Cong. Rec. S2550-64 (daily ed. Mar. 15, 1989), Id., S.2802-04 (daily ed. Mar. 16, 1989). Moreover, Rule XI specifically reserves to the Senate as a whole the right to hear directly the testimony of any or all witnesses it desires at any time prior to the impeachment vote.

Insofar as Judges Hastings and Nixon contend that they each have an individual right to an impeachment tried before the full Senate and that a federal district court may supervise the Senate's procedures for impeachment, they are mistaken. Article I, Section 3 provides that "The Senate shall have the sole power to try all impeachments," and Section 5 of the same Article states that "each House may determine the Rules of its Proceedings." It is crystal clear that impeachment proceedings are wholly committed to Congress under the Constitution. Thus a classic political question is presented under Baker v. Carr, 369 U.S. 186, 217 (1962). Absent evidence that the Senate is violating the Constitution, the Court should stay its hand.

The use of a committee to develop facts is not a new idea. This was the practice of the House of Lords in the early part of the 17th Century, and the possibility of using a committee in the process was first proposed in the Senate as early as 1904. Thereafter, the committee approach was debated from time to time.

Some urged use of a committee because as few as three Senators had been present during impeachment trials before the full body, which proceeded even in the absence of a quorum. In recent years Senators have relied heavily on written materials developed in their absence when an impeachment matter came to a vote. The committee procedure was used in 1986 for the impeachment of Judge Claiborne and, with some modification of procedures in light of that experience, it has been reinvoked. S.Rep. No. 101-1, 101st Cong., 1st Sess. 9-15, 110-115 (1989); S.Rep. No. 100-542, 100th Cong., 2d Sess. 113-114 (1988).

It is not this Court's function to tinker with the Senate's procedures or to anticipate problems that could arise. The procedures adopted do not by their terms violate any constitutional rights or offend fundamental notions of justice.

The Senate's interpretation of what type of trial Article I, Section 3 requires is entitled to deference, absent a clear Constitutional violation. Judge Hastings through his able counsel argued forcefully before the Senate his conception of what a trial required, and the Senate rejected it.[1] The Constitution simply does not specify in detail what is required for the trial before the Senate beyond: 1) an oath or affirmation 2) a two-thirds vote 3) the possible punishment or remedy and 4) who presides when the President is tried. The Constitution does not say that the full Senate must try all impeachments, nor does the verb "try" necessitate granting the accused all the requirements of modern criminal due process as the complaining judges suggest. In fact, at the time the Constitution was drafted, definitions of "try" included "to sit in judgment" and "to examine (a person) for the purpose of testing his qualifications."[2] Of course, persons and bodies may sit in judgment without having received evidence in the manner Article III courts try criminal charges.

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[1] See, e.g., Memorandum of Behalf of United States District Judge Alcee L. Hastings Concerning the Use of a Rule XI Senate Trial Committee to Receive Evidence in this Case, Sept. 6, 1988, Def. Appendix p. 21; Impeachment Trial Procedures: Hearing before the Committee on Rules and Administration .101st Cong., 1st Sess., S.Hrg. 101-3 (1989); S. Rep. No 100-542, 100th Cong. 2d Sess. (1988); Cong. Rec. S2803-04 (daily ed. March 16, 1988), adopting S. Res. 38, providing for the appointment of a committee to receive evidence with respect to Judge Hastings.

The relief sought by plaintiff and intervenor would be utterly foreign to our system of divided powers. As Chief Justice Marshall stated in McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 421 (1819):

> [T]he sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.

Courts in this District have regularly rejected other petitions seeking judicial supervision of Congressional

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[2] Oxford English Dictionary, 2d ed., Vol. XVIII at 630. Other now-obsolete meanings included: to separate (one thing) from another or others; to set apart; to take or get out, to extract; to ascertain, find out (something doubtful, obscure, or secret) by search or examination; to sift out. Quotations exemplifying many of these definitions are indicated as having legal meanings.

proceedings;[3] a court found that the Senate was the sole tribunal for Judge Ritter's impeachment proceedings in the 1930's when he sought judicial review,[4] and the Court today likewise refuses to second-guess the Senate's impeachment proceedings.

Double Jeopardy:

Judge Hastings nonetheless contends that his impeachment is primarily a second trial of the same criminal charges which resulted in his acquittal after jury trial. While many but by no means all of the Articles of Impeachment concern aspects of his felony trial, his position is again premised on a fundamental misapprehension. Because he believes he is entitled to the process owed an accused criminal, he urges that principles of double jeopardy should apply, but impeachment is not a criminal proceeding.

Impeachment trials are sui generis: in several instances in the Constitution, impeachment is distinguished from criminal proceedings. The accused has no right to a jury, and the President may not pardon a person convicted by impeachment. The Framers understood that impeachment trials were fundamentally political, which seems to indicate that impartiality -- however much it has been present and is to be desired -- is not guaranteed. It is clear that the federal rules of evidence do not apply in impeachment trials, and the Constitution itself does not require unanimity among the Senators sitting in judgment. Senators determine their own burdens of proof: they need not be persuaded beyond a reasonable doubt that the defendant committed each and every element of every Article. Deviating from English precedent, the Framers sharply limited the remedies or punishment available upon conviction to disqualification and removal from office, and when the Constitution speaks of Article III judges, it states, as the certificate of every federal judge repeats, that he or she serves subject to good behavior. While some process is clearly due, rights are not necessarily compromised by varying from the rights and process accorded defendants in criminal proceedings. At trial the Senators themselves may again weigh if they see fit Judge Hastings' claims that he has been wrongly tried because of his earlier acquittal.[5]

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[3] Claiborne v. United States Senate, C.A. No. 86-2780 (D.D.C. 1986), Hearing on Motion for Temporary Restraining Order, October 8, 1986, at 4; Williams v. Bush, C.A.No. 81-2839 (D.D.C. 1981), Hearing on Motion for Temporary Restraining Order, Nov. 27, 1981, at 23; Memorandum, February 3, 1982.

[4] Ritter v. United States, 84 Cl.Ct. 293, 296 (1936), cert. denied, 300 U.S. 668 (1937).

Judge Hastings suggests that Article I, Section 3, which states that "the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law" by implication bars impeachment following an acquittal. The more natural meaning of the Constitution is that it acknowledges separate and different roles for the executive's power of prosecution and the legislature's impeachment powers. It is unthinkable that the executive branch could effectively prevent an impeachment by purporting to try a judge or that the judiciary could prevent an impeachment by accepting a plea. Rather, the executive and legislative branches have different roles to play if a judge engages in criminal behavior. Moreover, Judge Hastings faces Articles of Impeachment charging false testimony, fabrication of false records and grossly improper disclosure of confidential law enforcement information, for which he was not previously tried. Impeachment proceedings are not to be restricted by principles of double jeopardy any more than a conviction always necessitates impeachment.

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[5] Senator Specter voted to deny Judge Hastings' motion to dismiss, but inserted a thoughtful essay on developments in double jeopardy law into the Congressional Record, stating that after all the evidence is in, the Senate would revisit and more fully consider Judge Hastings' claims going to the fundamental fairness of the proceedings. 135 Cong. Rec. S.2804 (daily ed. March 16, 1989).

Trial Expenses:

The Court must also reject Judge Hastings' ineffective assistance of counsel and diminution of pay arguments. No substantive statute provides for attorney fees for judges or any other official in impeachment proceedings. While the burdens of legal defense can of course be heavy, the Senate alone determines procedures in this regard as in other matters raised in the complaint. The Senate will be paying the expenses of necessary witnesses for Judge Hastings. As yet, it is uncertain whether the Senate would pay Judge Hastings' fees if he is acquitted. It has not apparently paid expenses up front in the past and it is not subjecting Judge Hastings to special treatment different from that used in prior impeachments. The situation presented does not violate Article III, Section 1.

Speech and Debate Clause:

The complaints also raise troubling Speech and Debate clause issues. Article I, Section 6 provides that Senators and Representatives' speech or debate shall not be questioned in any other place. The Supreme Court has construed this clause broadly, and this Court must accordingly protect the legitimate activities of Senators acting within their constitutionally prescribed functions, including legislation and impeachment. See, United States v. Johnson, 383 U.S. 169, 180 (1966); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Gravel v. United States, 408 U.S. 606, 625 (1972); In re Request for Access to Grand Jury Materials, 823 F.2d 1438, 1446 (11th Cir. 1987). Judge Hastings has sought to obviate the clear requirements of the Constitution by naming the Secretary of the Senate and the Acting Public Printer. However, their functions in this matter are to assist the Senators in conducting the hearings and disseminating the transcripts and committee report to Senators not on the committee. For the purposes of this action, their internal functions are fully protected by the Speech and Debate Clause. Even if the Court were to enjoin these persons, the Senate could simply designate one of its own members to fulfill their ministerial functions. Any order issued by the Court restraining the functions of these defendants not protected by the Speech and Debate Clause would have no effect.

Conclusion:

During the argument, counsel for Judge Hastings made subtle suggestions to the Court that there was some special need to protect Article III judges from the Senate's impeachment power because the independence of the judiciary might be compromised. This was an ill-advised argument. Given the size of the federal judiciary, surely an occasional judge will violate his or her duty and it strengthens rather than lessens the independent judiciary if such behavior is decisively identified and the offending judge removed. The Senate has been tolerant in such matters, cautious and careful, for it recognizes the need to move only where the conduct of a judge under scrutiny compels action. To now suggest that Article III judges should have a preference not mentioned in the Constitution illustrates the mistaken notion that the judiciary is above normal constitutional standards. As is the case with officials of any branch of government, judges gain respect through their own actions, not by receiving preferential treatment when misconduct occurs.

There is no possibility of success on the merits, all equities favor the Senate, and the public interest will be served by permitting the impeachment trial of Judge Hastings to proceed as contemplated by the Senate. Due to the political question raised, for prudential reasons, and in recognition of the Speech and Debate Clause, the Court finds the case non-justiciable and it declines to become involved in monitoring the Senate's constitutionally-assigned proceedings.

The complaints are dismissed. An appropriate Order is filed herewith.

Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

July 5, 1989.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
JUL 7 1989
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

The Honorable ALCEE L. HASTINGS
U.S. District Judge,

Plaintiff,

and

WALTER L. NIXON, JR.,

Intervenor,

v.

The UNITED STATES SENATE,
The IMPEACHMENT TRIAL COMMITTEE,
Established Pursuant to
Senate Resolution 38, and
The Honorable WALTER J. STEWART
Secretary of the
United States Senate
The Honorable JOSEPH E. JENIFER
as Acting Public Printer
of the United States

Defendants.

NOTICE OF APPEAL

Civil Action No,
89-1602-GAG

Notice is hereby given that United States District Judge, Alcee L. Hastings, the plaintiff above named, hereby appeals to the United States Court of Appeals for the District of Columbia from the order denying plaintiff's motion for preliminary injunction and dismissing the underlying complaint entered in this action on July 5, 1989.

Dated: New York, New York
July 6, 1989

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ORIGINAL

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

The Honorable **ALCEE L. HASTINGS**
U.S. District Judge,

Plaintiff,

and

WALTER L. NIXON, JR.,

Intervenor,

v.

The **UNITED STATES SENATE,**
The **IMPEACHMENT TRIAL COMMITTEE,**
Established Pursuant to
Senate Resolution 38, and
The Honorable **WALTER J. STEWART**
Secretary of the
United States Senate
The Honorable **JOSEPH E. JENIFER**
as Acting Public Printer
of the United States

Defendants.

89-5188

EMERGENCY MOTION FOR
INJUNCTION PENDING
APPEAL AND EXPEDITED
CONSIDERATION OF THE
MERITS WITHOUT
FURTHER BRIEFING

Civil Action No,
89-160[illegible]

United States Court of Appeals
For the District of Columbia Circuit

FILED JUL 7 1989

CONSTANCE L. DUPRÉ
CLERK

Judge Alcee L. Hastings, plaintiff-appellant herein, moves the court for an order staying enforcement of the order of the United States District Court for the District of Columbia, Honorable Gerhard A. Gesell, entered on July 5, 1989, denying plaintiff-appellant's motion for a preliminary injunction enjoining his impeachment proceedings in the United States Senate, pending plaintiff-appellant's appeal therefrom.

1. Plaintiff-appellant previously requested said stay before the district court during oral argument, June 29, 1989, on the motion for preliminary injunction.

2. The District Court's order on plaintiff-appellant's motion for preliminary injunction inferentially denies plaintiff-appellant's motion for a stay pending appeal.

3. To be effective, relief on this motion is needed by July 10, 1989, the date on which plaintiff-appellant's impeachment trial by Senate Committee is scheduled to commence.

4. An order staying the enforcement of such order of the District Court pending plaintiff-appellant's apeal is necessary because plaintiff-appellant will suffer irreparable harm which is both great and immediate. Specifically, plaintiff-appellant will be required to sit before an unconstitutionally constituted body; he must defend charges on which he has previously been acquitted; he must do so with inadequate resources to maintain his defense; and he must do so under procedures that are contrary to basic concepts of fairness. Once the proceedings on the merits begin, plaintiff-appellant's right to judicial review may be forever lost.

5. The facts upon which plaintiff-appellant relies for obtaining relief are set forth in the complaint, and highlighted in the accompanying memoranda, and in this action.

WHEREFORE, movant plaintiff-appellant prays for an emergency order enjoining enforcement of the order of the district court and for expedited consideration of the merits without further briefing.

Dated: New York, New York
July 6, 1989

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ORIGINAL

United States Court of Appeals
For the District of Columbia Circuit

FILED JUL 07 1989

CONSTANCE L. DUPRÉ
CLERK

89-5188

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

---------------------------------------X
The Honorable **ALCEE L. HASTINGS**
U.S. District Judge, :

Plaintiff, :
and
:
WALTER L. NIXON, JR.,
:
Intervenor,
:
v.
:
The **UNITED STATES SENATE,**
The **IMPEACHMENT TRIAL COMMITTEE,** :
Established Pursuant to
Senate Resolution 38, and :
The Honorable **WALTER J. STEWART**
Secretary of the :
United States Senate
The Honorable JOSEPH E. JENIFER :
as Acting Public Printer
of the Unites States :

Defendants. :
---------------------------------------X

Civil Action No,
89-1602-GAG

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL AND EXPEDITED CONSIDERATION OF THE MERITS WITHOUT FURTHER BRIEFING

INTRODUCTION

1. This action was instituted before the district court for the District of Columbia seeking declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202, to protect and secure the rights guaranteed to the plaintiff individually and as an Article III judge by the Constitution of the United States. Plaintiff, United States District Judge, Alcee L. Hastings sought temporary and preliminary injunctive relief, pursuant to Rule 65(a) and (b), Fed. R. Civ. P., pending the trial of his claims. The requested relief was denied and the complaint dismissed by order dated July 5, 1989.

JURISDICTION

2. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, as it is a final order of the district court for the District of Columbia.

3. This motion is made pursuant to District of Columbia Court of Appeals Local Rule 6(j).

ARGUMENT

United States District Court Judge Alcee L. Hastings makes this motion for an emergency stay of the order entered by the district court on the ground that he, and this nation's Constitution, will suffer irreparable harm if the trial of his impeachment before a Senate Committee is permitted to proceed as scheduled.

The factors which govern this Court's determination of whether a stay is warranted are four-fold:

> (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review. (2) Has the petitioner shown that without such relief, it will be irreparably injured? The key word is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. . . (3) Would issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest?

Virginia Petroleum Job. Ass'n v. Federal Power Comm'n., 259 F.2d 921, 925 (D.C. Cir. 1958). The answer to these questions with respect to the instant litigation favor issuance of a stay.

1. Public Interest

There can be little doubt that the interest of the people of this country in a full, deliberate judgment on the claims presented by Judge Hastings is paramount. In one fell swoop the district court has dispensed with serious, yet difficult, questions concerning the constituional framework of our government. Expediency has defined these proceedings thus far. The public interest cries out for a considered judgment that will appropriately safeguard both the integrity and independence of the judiciary.

2. Harm to Others

There exist no harm that will attend the Senate if the impeachment proceedings are enjoined pending appeal comparable to that which will be visited upon Judge Hastings if they are permitted to proceed. As implied by this Court in Virginia Petroleum, "[m]ere injuries," are insufficient both for purposes of granting a stay and for purposes of precluding its issuance where the other party will suffer irreparable harm. That the proceedings before the twelve member Senate Impeachment Committee may be temporarily delayed so that a full and fair resolution of Judge Hastings claims may be had hardly constitutes irreparable harm. That they may be permanently enjoined by a lawful order of this Court constitutes harm to no one; rather, said injunction if issued following full review by this Court would constitute a vindication of Judge Hastings's rights to fundamental fairness and a clear and decisive victory for the Constitution of these United

States.

3. Irreparable Harm

In Virginia Petroleum this Court noted that

> The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

259 F.2d at 925. By this standard alone, Judge Hastings's emergency motion for a stay pending appeal must be granted. For over eight years Judge Hastings has defended against assaults on his integrity based upon innuendo and circumstantial evidence. He now faces trial before a select committee of twelve in large part on issues that were determined decisively in his favor in 1983. Extant jurisprudence holds that the substantive determination of the Senate on these Articles of Impeachment are of doubtful reviewability in the courts. See Ritter v. United States, 84 Ct.Cl. 293, 296 (1936), cert. denied, 300 U.S. 668 (1937).

Thus, if Judge Hastings is compelled to sit for the trial of this impeachment before a committee of twelve, and further if his construction of the Constitution -- i.e., that it requires trial before the full Senate -- is correct, the injury imposed upon Judge Hastings, the people, and Constitution cannot be removed. He will have committed his claims to an unconstitutionally constituted tribunal. The irreparable injury that will flow therefrom, if, as Judge Hastings contends, the requirement to try attaches to all Senators so that an independent, impartial, and informed judgment may be issued, is manifest. The remedy applauded by the district court should be of no solace. Videotapes do not preserve the full demeanor of a witness, for example, eye contact with others present may be telling and yet may not be captured on film. Senators will resort to chamber-gossip and other short-cuts to gather information and thereafter vote in violation of Judge Hastings's individual rights and in violation of their oath of office and the special oath in these proceedings.

Moreover, and more important, what may preserve the appearance of fairness, indeed what may even protect individual rights -- although we in no way intimate that the procedures adopted will -- is not the relevant inquiry. The inquiry squarely put by Judge Hastings's challenge is "What does the Constitution demand?" The district court has determined that the Constitution requires that the Senate have unfettered, unreviewable, and indeterminate discretion in the conduct of its proceedings. The Constitution states otherwise.

Judge Hastings's faces irreparable harm that is grave, immediate and unjust. Once removed, if removed, he can never vindicate his rights. Thus, although not capable of repetition, his claims will forever evade review. The harm that will attach touches not only this judge, but all federal judges and the people of this country whom they vow to serve. The district court suggests that the advancement of the framer's interest in the independence of the judiciary is "ill-advised." The court further implies that Judge Hastings seeks preferential treatment

because of his status as a Judge. To the contrary, Judge Hastings's seeks the fair application of "normal constitutional standards" to him and to the Senate, which by virtue of the district court's opinion, remains "above normal constitutional statndards."

4. Likelihood of Success

> To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (i.e., the balance of hardships tips decidely toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.

Washington Metropolitan Area Transit Comm'n v. Holiday Tours, 559 F.2d 841, 845 (D.C. Cir. 1977) (quoting Hamilton Watch Co. v Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953).

Judge Hastings's complaint satisfies the criteria enunciated above. The district court recognized the difficulty of the questions posed, yet determined, in his judgment, there was no likelihood of success on the merits. The weighty constitutional issues raised by Judge Hastings deserve more tempered consideration. The arguments advanced by both Judge Hastings and Intervenor, Walter Nixon, seek a constitutional mandate that will guide the future development of our nation.

Judge Hastings's has been once acquitted on the majority of the charges that now form the bases of his impeachment. He does not seek "preferential treatment," but rather, he seeks judicial recognition and resolution of the competing claims of what constitutes the proper respect to be accorded the Constitution in all trials of impeachment before the Senate.

Dated: New York, New York
July 6, 1989

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United States Court of Appeals
For the District of Columbia Circuit
FILED JUL 07 1989
CONSTANCE L. DUPRÉ
CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89- 89-5188

ALCEE L. HASTINGS,
Plaintiff-Appellant,
and
WALTER L. NIXON, JR.,
Intervening Plaintiff,
v.
THE UNITED STATES SENATE, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MEMORANDUM OF APPELLEES IN OPPOSITION TO EMERGENCY MOTION OF JUDGE ALCEE L. HASTINGS FOR AN INJUNCTION PENDING APPEAL[1]

On July 10, 1989, a committee of twelve senators, a defendant in this action, will begin, pursuant to Senate Impeachment Rule XI,[2] "to receive evidence and take testimony" on the articles of impeachment against United States District Judge Alcee L. Hastings of the Southern District of Florida.[3] The committee established July 10 as the beginning date for these hearings in an order issued ten weeks ago on April 21, 1989.[4] On the applications of the House and Judge Hastings the committee has issued, or is in the process of issuing, subpoenas for more than sixty witnesses.

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[1] Judge Hastings' motion is styled "Emergency Motion for Injunction Pending Appeal and Expedited Consideration of the Merits Without Further Briefing." To expedite the preparation of this memorandum, we will address here Judge Hastings' emergency motion for an injunction pending appeal. We will follow this memorandum with a short response to Judge Hastings' request for expedition.

[2] The text of Rule XI of the Rules of Procedure and Practice In the Senate When Sitting on Impeachment Trials is attached to this Memorandum as Exhibit A.

The committee hopes to complete the taking of evidence within the next three to four weeks. The Congress will be in recess from early August until September 6, 1989. During the August recess, the committee, with the aid of the Acting Public Printer, another defendant, will arrange for printing the testimony and exhibits introduced into evidence by the parties to the impeachment. This will enable the committee, in accordance with

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[3] On August 3, 1988, the House of Representatives adopted House Resolution 499, 100th Congress, impeaching Judge Hastings of high crimes and misdemeanors. 134 Cong. Rec. H6193 (daily ed.). The seventeen articles of impeachment allege that Judge Hastings engaged in a corrupt conspiracy in 1981 to obtain money from parties in a criminal case pending before him (Article I), that he testified falsely at his 1983 criminal trial for conspiracy (Articles II-XV), that in 1985 he improperly revealed confidential wiretap information necessitating the termination of a law enforcement investigation (Article XVI), and that through this conduct Judge Hastings brought disrepute on the federal courts and the administration of justice (Article XVII). See 134 Cong. Rec. H6180-82.

[4] Defendants' Appendix in Opposition to Plaintiff's Motion for Preliminary Injunction: Record of Senate Proceedings in the Impeachment of Judge Alcee L. Hastings ("Def. App.") at 627. This six-volume appendix documents the Senate's proceedings in the Hastings impeachment from the exhibition of the articles on August 9, 1989, through filings and orders on June 23, 1989.

Impeachment Rule XI, to "report to the Senate in writing," early in September, "a certified copy of the transcript of the proceedings and testimony had and given before such committee." The committee is authorized to include in that report to the Senate, which is yet another defendant in this action, "a statement of facts that are uncontested and a summary, with appropriate references to the record, of evidence that the parties introduced on contested issues of fact." S. Res. 38, 101st Cong., 1st Sess. (1989); Def. App. 298. The committee will not recommend to the Senate whether it should vote to convict or to acquit on any article. Memorandum of the District Court ("Mem.") at 3.

Consistent with the recommendations of the Committee on Rules and Administration, floor proceedings on the impeachment are expected to be scheduled after an interval, lasting probably into October, to allow senators who are not on the committee to study the record. As the district court noted in its memorandum, senators will be able to supplement their reading of the record by replaying the videotape of the proceedings "at any time for any purpose such as to evaluate the demeanor of witnesses whose credibility may be placed in issue." Mem. at 3. When the impeachment is taken up on the floor, the evidentiary record submitted by the committee will be "subject," under Impeachment Rule XI, "to the right of the Senate to determine competency, relevancy, and materiality." Also, the rule specifically provides that "nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate." Only after deciding, if a question is raised, whether the record reported by the committee is a sufficient basis for the Senate's action on the articles, will the Senate hear final arguments from the parties, deliberate, and vote.

In the district court, Judge Hastings sought to restrain the Senate's progress toward disposition of the articles through a preliminary injunction against the Secretary of the Senate and the Acting Public Printer. The requested restraint against the Secretary of the Senate would have barred him from paying the salaries of committee staff, and from paying committee expenses. The restraint on staff salaries would prevent the committee from using employees to mark and file the exhibits offered by the parties, arrange for the service of subpoenas, and provide legal advice to the committee. The restraint on committee expenses would prevent the committee from reimbursing the travel and per diem expenses of the parties' witnesses, and prevent the committee from using a court reporting service to produce a transcript of the committee's hearings. The restraint against the Secretary of the Senate also would prevent him from acting as the Senate's officer in receiving the committee's report in September. Finally, the plaintiff sought to restrain the Acting Public Printer from printing and distributing, through officials of the Senate, the committee's report to full membership of the Senate.

After plenary briefing and argument, the district court denied Judge Hastings' motion for a preliminary injunction, and dismissed his complaint.[5/] The court concluded that "[t]here is no possibility of success on the merits, all equities favor the Senate, and the public interest will be served by permitting the impeachment trial of Judge Hastings to proceed as contemplated by the Senate." Mem. at 11.

In his emergency motion for an injunction pending appeal, Judge Hastings asks for an "order enjoining enforcement of the order of the district court." Hastings Motion at 2. The district court's order simply dismissed the complaint and denied the motion for a preliminary injunction. We shall assume for the purpose of the argument which follows that Judge Hastings is seeking from this court the same preliminary injunctive relief that had been denied by the district court.

THE MOTION FOR AN INJUNCTION PENDING APPEAL SHOULD BE DENIED

A movant for an injunction pending appeal has the "burden of showing that exercise of the court's extraordinary injunctive powers is warranted." Cuomo v. United States Nuclear Regulatory Commission, 772 F.2d 972, 974 (D.C. Cir. 1985). In assessing motions for injunctions, the court considers "(i) the likelihood that the moving party will prevail on the merits; (ii) the

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[5/] The district court also denied Judge Nixon's motion for a preliminary injunction and dismissed his complaint. Judge Nixon, whose evidentiary hearings will begin on September 6, 1989, is not seeking an emergency injunction pending appeal.

prospect of irreparable injury to the moving party if relief is withheld; (iii) the possibility of harm to other parties if relief is granted; and (iv) the public interest." D.C. Cir. Rule 7(h)(1)(A). Judge Hastings' extraordinary effort to enjoin the Senate's proceedings on the articles of impeachment fails under each of these tests.

1. The Constitution Negates Any Chance that Judge Hastings Will Prevail on the Merits of His Appeal

In ordinary cases, there may be circumstances in which, "[t]o justify the granting of a stay, a movant need not always establish a high probability of success on the merits." Cuomo, 772 F.2d at 974. However, "when requested immediate injunctive relief deeply intrudes into the core concerns of [a coordinate] branch, a court is 'quite wrong in routinely applying ... the traditional standards governing more orthodox stays.'" Adams v. Vance, 570 F.2d 950, 954 (D.C. Cir. 1978)(quoting Sampson v. Murray, 415 U.S. 61, 83-84 (1974))(internal quote in Sampson omitted). In Adams, the core concerns involved were those of the executive branch in exercising the President's constitutionally committed authority over foreign affairs. Here, the core concerns are those of the Senate in exercising its constitutionally committed "sole Power to try all Impeachments." Art. I, sec. 3, cl. 6. As this court held in Adams, "if such a request is justiciable, the party seeking this kind of relief would have to make an extraordinarily strong showing to succeed." 570 F.2d at 955.

a. This Action Is Barred By The Speech Or Debate Clause

The Speech or Debate Clause of the Constitution, Art. I, sec. 6, cl. 1, which provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place," is "an absolute bar to interference," Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975), by the executive or judicial branches in "the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." Gravel v. United States, 408 U.S. 606, 625 (1972). The absolute bar of "the Speech and Debate Clause prevents [the courts] from questioning Congress about actions taken in the impeachment process. The Speech and Debate Clause is applicable because impeachment is viewed as a legislative activity in the sense that it is one of the 'other matters which the Constitution places within the jurisdiction of either House.'" In re Request for Access to Grand Jury Materials, Grand Jury No. 81-1, Miami (Hastings), 833 F.2d 1438, 1446 (11th Cir. 1987) (quoting Gravel).

In the district court, Judge Hastings sought to avoid the force of the Speech or Debate Clause by seeking relief from the Secretary of the Senate and the Acting Public Printer. These officials, however, are not like the Sergeant at Arms in Kilbourn v. Thompson, 103 U.S. 168 (1881), who executed the House's order to arrest a witness, or the Sergeant at Arms in Powell v. McCormack, 395 U.S. 486 (1969), who implemented the House's exclusion of Representative Powell by denying him his salary. Rather, the Secretary of the Senate, by disbursing funds for the expenses of the committee, including the salaries of its staff, functions like committee counsel who share in the Speech or Debate immunity of members by helping them to "'cause[] the ... subpoena to be issued ... under the authority of Senate Resolution.'" Eastland, 421 U.S. at 507. As for their receipt, printing, and distribution to senators of the committee's report, the Secretary and the Acting Public Printer are protected by the unanimous holding of the Supreme Court that, while some distribution of congressional reports outside of Congress might be actionable, "Members of Congress and their committee aides and employees are immune under the Speech or Debate Clause for preparation of the Committee report for distribution within the halls of Congress." Doe v. McMillan, 412 U.S. 306, 338-39 (1973)(Rehnquist, J., concurring and dissenting).

Eastland and Doe eliminate any likelihood of reversing on appeal the district court's unassailable conclusion that the Secretary's and Acting Public Printer's "functions in this matter are to assist the Senators in conducting the hearings and disseminating the transcripts and committee report to Senators not on the committee. For the purposes of this action, their internal functions are fully protected by the Speech and Debate Clause." Mem. at 10.

b. The Senate's Exercise of its Sole Power to Try Impeachments is Unreviewable

Article I, section 3, clause 6 of the Constitution provides that "[t]he Senate shall have the sole Power to try all Impeachments." In establishing procedures to exercise that "sole Power", the Senate also draws on the grant to each House under Article I, section 5, clause 2 of the Constitution of the power to "determine the Rules of its Proceedings." Resting on these constitutional grants to the Senate, the district court securely rested its dismissal of Judge Hastings' complaint on the additional ground that "[i]t is crystal clear that impeachment proceedings are wholly committed to Congress under the Constitution. Thus a classic political question is presented under Baker v. Carr, 369 U.S. 186, 217 (1962)." Mem. at 4. Fifty years ago, the Court of Claims rejected, for the same reason, Judge Ritter's claim for review of his completed removal from office, concluding that "the word 'sole' was used with a definite meaning and with the intention that no other tribunal should have any jurisdiction of the cases tried under the provisions with reference to impeachment." Ritter v. United States, 84 Ct.Cl. 293, 296 (1936), cert. denied, 300 U.S. 668 (1937). After carefully examining the available historical evidence and legal commentary, the court flatly concluded "that no court can review the impeachment proceedings and set them aside. ... In our opinion, the Senate was the sole tribunal that could take jurisdiction of the articles of impeachment presented to that body against the plaintiff and its decision is final." Id. at 298, 300.[6]

This conclusion that the Senate's exercise of the power of trying impeachments is not reviewable is strongly supported by the development of the impeachment provision at the Constitutional Convention. Initially, the Framers had proposed to give the Supreme Court the power to try impeachments. See 2 M. Farrand, The Records of the Federal Convention of 1787, at 185-86 (rev. ed. 1966). However, after extended debate the Convention transferred the forum for impeachment trials from the courts to the Senate, because in Gouverneur Morris' words, "no other tribunal than the Senate could be trusted." Id. at 551. Alexander Hamilton explained that, as a representative body, only the Senate could be expected to "possess the degree of credit and authority, which might, on certain occasions, be indispensable towards reconciling the people to a decision that should happen to clash with an accusation brought by their immediate representatives," the House, and maintain "the public tranquillity." The Federalist No. 65, at 427 (B. Wright ed. 1961).

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[6] Accord In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami), 669 F. Supp. 1072, 1077 (S.D. Fla.)(per Butzner, J.) ("A court cannot restrain the Senate from sitting as a court of impeachment.... Nor can a court review the Senate's decision."), aff'd, 833 F.2d 1438 (11th Cir. 1987). Judge Butzner agreed with the parties before him, the House and Judge Hastings, that he "should not decide [Judge Hastings'] defenses of double jeopardy and denial of a speedy trial. Pleas of double jeopardy and denial of a speedy trial are pleas in bar that must be addressed to the forums that are charged with the constitutional duty of conducting impeachments." Id.

The Framers viewed impeachment as fundamentally a political process. Although "crimes of a strictly legal character fall within the scope of the [impeachment] power ... it has a more enlarged operation, and reaches what are aptly termed political offences." 1 J. Story, Commentaries on the Constitution § 764, at 559 (5th ed. 1905). "Many of the offences which will be charged against public men will be generated by the heats and animosities of party," which "are precisely those [matters] which it seems most important to exclude from the cognizance and participation of the judges." Id., § 766, at 560. By "[e]xemption of [the courts] from all participation in, and control over, the acts of political men in their official duties" through impeachment, the Framers sought to promote the "spirit of moderation and exclusive devotion to juridical duties," id. at 561, whose preservation they viewed as essential to maintaining "the reverence and respect belonging to the judicial character," id. at 560.

The Framers' deliberate substitution of the Senate for the courts as the "sole" trier of impeachments strongly undercuts the claim that a conviction on impeachment charges may be reviewed in the courts. "[W]hile there was some suggestion ... [at the Constitutional Convention] that the Senate might abuse its power, there was no intimation by anyone that the impeachment proceedings might be reviewed or set aside by the courts." Ritter, 84 Ct.Cl. at 298. Rather than grafting judicial review on the Senate's exercise of its power, the Framers adopted safeguards within the Senate's trial mechanism by requiring that Senators sitting as a court of impeachment "be on Oath or Affirmation" and that "no Person shall be convicted without the Concurrence of two-thirds of the Members present." Art. I, sec. 3, cl. 6.

In Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867), the State of Mississippi sought an injunction restraining President Andrew Johnson from executing a statute on the ground that it was unconstitutional. The Court held that the Constitution barred such relief against the political branches. Addressing the possibility that, if the Court issued an injunction, the President's compliance with the injunction could lead to his impeachment, the Court asked,

> And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court? These questions answer themselves.

Id. at 501. The district court's conclusion that plaintiff's complaint is "non-justiciable" and that it must "decline[] to become involved in monitoring the Senate's constitutionally-assigned proceedings," Mem. at 11, thus accords with the Supreme Court's long-standing recognition that it would be alien to the Framers' design for the courts to intervene in a pending impeachment.

c. The Appeal is Also Not Likely to Succeed Because the Complaint Fails to State a Claim for Relief

We rest principally on the district court's memorandum to show that if the complaint was justiciable, it should nonetheless be dismissed for failure to state a meritorious claim, and add the following only for emphasis.

Judge Hastings' claim that the constitutional bar against double jeopardy precludes his trial on impeachment on the bulk of the articles was given careful consideration by the Senate, which rejected his motion to dismiss. His motion was thoroughly briefed, see S. Doc. No. 4, 101st Cong., 1st Sess. (1989), and argued to the full Senate on the floor in two hours of oral argument in which Judge Hastings personally participated, 135 Cong. Rec. S2250-64 (daily ed. Mar. 15, 1989), Def. App. 280-94. The Senate concluded, as did the district court, that the Framers' decision to limit the consequences of impeachment to removal from office, and possibly (but not necessarily) the disqualification to hold future office, leaving all questions of personal punishment to the courts in prosecutions brought by the executive, "acknowledges separate and different roles for the executive's power of prosecution and the legislature's impeachment powers." Mem. at 8-9.[7] The district court correctly noted that, while the Senate denied Judge Hastings' motion to dismiss without trial, senators may again weigh Judge Hastings' claim when they deliberate on the articles. Mem. at 8 & n.5 (citing 135 Cong. Rec. S2804 (daily ed. March 16, 1989)(remarks of Sen. Specter)).

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[7] Accord In the Matter of the Impeachment Inquiry Concerning U.S. District Judge Alcee L. Hastings: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 100th Cong., 1st Sess. 348 (1987)(Appendix 1) (reprinting report of Circuit Judges Godbold, Tjoflat, and Johnson, and District Judges Pointer and Kelley)("It must be remembered that, as to the charges involving bribery, impeach-
(footnote continued)

With respect to the Senate's appointment of a committee to report an evidentiary record, the district court had ample basis to conclude that "[t]he procedures adopted do not by their terms violate any constitutional rights or offend fundamental notions of justice." Mem. at 5. The Constitution's commitment to the Senate of the power to "try" impeachments was intended to fulfill the Framers' intent that the Senate act in "judicial character as a court." The Federalist No. 65, at 426. The Framers intended that the Senate perform this judicial function impartially, "to preserve, unawed and uninfluenced, the necessary impartiality between an individual accused, and the representatives of the people, his accusers." Id. at 427 (emphasis omitted). However, the Framers did not intend to obligate the Senate to replicate all features of a judicial trial. Hamilton recognized that the Senate "can never be tied down by such strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the judges, as in common cases serve to

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ment does not serve the same purpose as criminal prosecution. Impeachment is remedial and designed to protect the institution of government from corrupt conduct.... [D]ouble jeopardy principles are not applied to an impeachment proceeding.").

limit the discretion of courts in favor of personal security." Id. at 428. Justice Story similarly characterized the Senate, acting as a court of impeachment, as a tribunal "confined as little as possible to strict forms." 1 J. Story, § 765, at 560.[8]

The sole function of the Rule XI committee is to "report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee," and a neutral summary of uncontested facts and of the evidence on disputed factual issues. S. Res. 38, § 5, Def. App. 298. In the proceeding before the committee, Judge Hastings will have an opportunity with the assistance of counsel and the subpoena power of the Senate to develop a record to present to the full Senate. Rule XI explicitly preserves "the right of the Senate to determine competency, relevancy, and materiality" of the evidence taken in the committee. Thus, "the evidence would be offered [in the Senate], and the Senate would pass on it." 78 Cong. Rec. 9929 (1934) (Sen. Norris). Rule XI specifically reserves the Senate's prerogative to hear directly the testimony of any and all witnesses that it desires. Judge Hastings is free to request the Senate at the outset of floor consideration to avail itself of this prerogative and either to call particular witnesses to testify on the floor or to duplicate the entire trial. Whether the Senate were to grant or deny such a motion, and to hear witnesses live, watch them on videotape, or read the transcripts of their testimony, it would be exercising its duty to "try" Judge Hastings' impeachment consistently with the Constitution. The full Senate remains the "numerous court," The Federalist No. 65, at 428, which serves as the sole trier of fact and the sole judge of the law under the authority of Article I, section 3, clause 6 of the Constitution.

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[8] Justice Story noted "that the strictness of the forms of proceeding in cases of offences at common law is ill adapted to impeachments. The very habits growing out of judicial employments, the rigid manner in which the discretion of judges is limited and fenced in on all sides, in order to protect persons accused of crimes by rules and precedents, and the adherence to technical principles, which, perhaps, distinguishes this branch of the law more than any other, are all ill adapted to the trial of political offences in the broad course of impeachments." Id. at 557-58.

2. Judge Hastings Will Not Be Irreparably Harmed By the Evidentiary Proceedings of the Impeachment Trial Committee

Judge Hastings argues that he will be irreparably harmed by the evidentiary proceedings of the impeachment trial committee because "[h]e will have committed his claims to an unconstitutionally constituted tribunal." Hastings Memorandum at 4. His argument fails to demonstrate harm, let alone irreparable harm, because it misconstrues the function of the committee. Neither the House nor Judge Hastings will be committing their claims to the committee. As described above, the committee serves as a conduit to the Senate which retains full and final control over the record that will form the basis for the Senate's deliberations on the articles. Further, to the extent that Judge Hastings argues that the harm he anticipates will be irreparable because the Senate's final judgment may be unreviewable if he is convicted, id. at 5, that consequence would flow from the constitutional separation of powers, and is not a basis for anticipatory judicial intervention in the proceedings of the Senate.

3. Other Parties Would Be Harmed by an Injunction

Twelve members of the Senate have arranged and rearranged many of their other obligations to be in attendance at the evidentiary proceedings that will last through the month of July. House managers and counsel have prepared for months to attend and participate in these proceedings. Dozens of both parties' witnesses have been subpoenaed to be in Washington for these hearings, and have had to make arrangements in their own business and personal lives to do so. The disruption that would be caused by any restraint imposed by this court should count heavily against an injunction pending appeal.

4. The Public Interest Weighs Against Any Delay in the Senate's Proceedings

The House exhibited the impeachment articles against Judge Hastings on August 9, 1988. More than eight months ago, when it acceded to Judge Hastings' request to postpone the impeachment proceedings until the succeeding Congress, the Senate directed the parties that they "shall be prepared by March 1, 1989, or as soon thereafter as the Senate determines testimony should be heard, to present their evidence." S. Res. 480, § 3, 134 Cong. Rec. S13750 (daily ed. Sept. 30, 1988), Def. App. 95-96. The Senate then delayed its decision whether to appoint an evidentiary committee until the full Senate could hear and decide Judge Hastings' motions to dismiss. In order to be entirely fair to the parties, and to permit Judge Hastings unprecedented discovery in an impeachment proceeding, including the taking of pretrial examinations, the committee then exercised its discretion to defer the beginning of the evidentiary proceedings for four additional months, to July 10, 1989.

Thus, eleven months will have elapsed from the exhibiting of the impeachment articles to the beginning of evidentiary proceedings. This period compares with an interval of five weeks between exhibition and trial in Judge Claiborne's impeachment,[9] and is the longest period provided before taking evidence on any articles of impeachment in the Nation's history.[10] The people of the Southern District of Florida have a need for a full district court. The Senate has a responsibility to bring these impeachment proceedings to completion "in order to return Judge Hastings to the courtroom if he is acquitted or, if Judge Hastings is convicted, to allow the President to nominate and the Senate to confirm a replacement judge." 135 Cong. Rec. S6451 (daily ed. June 9, 1989), Def. App. 628. The public interest militates strongly against any restraint on the Senate's measured progress toward the final disposition of this impeachment.

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[9] See 132 Cong. Rec. 19495 (1986); S. Rep. No. 511, 99th Cong., 2d Sess. 3 (1986).

[10] See 14 Annals of Cong. 89, 153 (1804-05) (Judge Chase; 8-1/2 weeks); 6 Cong. Deb. 411; 7 Cong. Deb. 9 (1830) (Judge Peck; 7-1/2 months); Cong. Globe, 37th Cong., 2d Sess. 2277, 2942 (1862) (Judge Humphreys; 5 weeks); Cong. Globe, 40th Cong., 2d Sess. 1647, Supp. 29 (1868) (President Johnson; 3-1/2 weeks); 4 Cong. Rec., Pt. 7, at 2, 174 (1876) (Secretary of War Belknap; 3 months); 39 Cong. Rec. 1281, 2229 (1905) (Judge Swayne; 2-1/2 weeks); 48 Cong. Rec. 9051; 49 Cong. Rec. 21 (1912) (Judge Archbald; 4-1/2 months); 76 Cong. Rec. 5474-75 (1933); 77 Cong. Rec. 3397 (1933) (Judge Louderback; 10 weeks); 80 Cong. Rec. 3485, 4972 (1936) (Judge Ritter; 3-1/2 weeks).

CONCLUSION

The emergency motion for an injunction pending appeal should be denied.

Respectfully submitted,

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Dated: July 7, 1989

RULES OF PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING ON IMPEACHMENT TRIALS

XI. That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the District of Columbia Circuit
FILED JUL 07 1989
CONSTANCE L. DUPRÉ
CLERK

ORIGINAL

RECEIVED
JUL 7 1989
CLERK OF THE UNITED
STATES COURT OF APPEALS

No. 89- 89-5188

ALCEE L. HASTINGS,

Plaintiff-Appellant,

and

WALTER L. NIXON, JR.,

Intervening Plaintiff,

v.

THE UNITED STATES SENATE, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MEMORANDUM OF APPELLEES IN RESPONSE TO MOTION OF JUDGE HASTINGS FOR EXPEDITION WITHOUT FURTHER BRIEFING

Judge Hastings has included in his emergency motion for an injunction pending appeal a separate request that the court expedite the merits of the appeal without further briefing. In order not to delay the preparation of our response to the motion for an injunction pending appeal, we are setting forth in this separate memorandum our response to Judge Hastings' request for expedition of the merits.

We will, of course, be responsive to whatever schedule the court deems appropriate. There may be a strong public interest, however, in not expediting the appeal, or in avoiding an expedited schedule which requires the parties and their counsel to divert any part of their attention from the evidentiary hearings which the impeachment trial committee will conduct through the month of July. One purpose of the Speech or Debate Clause is to protect members of Congress, and their aides when acting on behalf of them, both in civil and criminal cases, from "divert[ing] their time, energy, and attention from their legislative tasks to defend[ing] the litigation." Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975). The complete focus of the parties and their counsel over the next month should be on the preparation of the best possible evidentiary record on which to consider the articles of impeachment.

If this appeal is not expedited we would also like to give consideration to the filing of a motion for summary affirmance, as the complete bar presented by the Speech or Debate Clause to Judge Hastings' action may be "so clear as to justify expedited action," Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir. 1980), by way of a motion for summary disposition.

Respectfully submitted,

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Dated: July 7, 1989

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5188

September Term, 1988

C.A. No. 89-1602-GAG

United States Court of Appeals
For the District of Columbia Circuit

FILED JUL 10 1989

CONSTANCE L. DUPRÉ
CLERK

Alcee L. Hastings,

Plaintiff-Appellant,

and

Walter L. Nixon, Jr.,

Intervening Plaintiff,

v.

The United States Senate, *et al*.,

Defendants-Appellees

BEFORE: Ruth B. Ginsburg, Silberman and Sentelle, Circuit Judges

ORDER

Upon consideration of appellant's emergency motion for injunctive relief pending appeal and for expedited consideration, it is

ORDERED that the motion be denied. Appellant has not demonstrated the requisite likelihood of success on the merits to warrant either injunctive relief pending appeal or expedition. *See* *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *D.C. Circuit Handbook of Practice and Internal Procedures* 38, 40 (1987).

Per Curiam

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The Honorable ALCEE L. HASTINGS,
Plaintiff,
WALTER L. NIXON, JR.,
Intervening Plaintiff,
v.
The UNITED STATES SENATE, et al.,
Defendants.

Civil Action
No. 89-1602-GAG

FILED
JUL 10 1989
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

NOTICE OF APPEAL

Notice is hereby given that Walter L. Nixon, Jr., petitioner above named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the order granting the dismissal of petitioner's complaints and denying the relief requested which was entered in this action on July 5, 1989.

Respectfully submitted,

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Date: July 10, 1989

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WALTER L. NIXON, JR.,
Appellant,
v.
The UNITED STATES SENATE, et al.,
Appellees.

No. 89-5191

United States Court of Appeals
For the District of Columbia Circuit

FILED JUL 11 1989

CONSTANCE L. DUPRÉ
CLERK

APPELLANT'S EMERGENCY MOTION FOR ACCELERATION OF BRIEFING AND ORAL ARGUMENT

Appellant Walter L. Nixon, Jr., pursuant to District of Columbia Circuit Rule 7(h)(2), respectfully moves for acceleration of briefing and oral argument in this appeal, and makes the following statements in support of the motion:

1. Appellant Walter L. Nixon, Jr., is the Chief Judge of the United States District Court for the Southern District of Mississippi, having been appointed by the President and confirmed by the Senate in 1968. Nixon was convicted on two counts of making a false statement in February 1986. The credibility of the witnesses is crucial to Nixon's defense. One major prosecution witness has recanted his trial testimony against Judge Nixon and has said he gave false testimony to please the government. A second key prosecution witness has admitted giving false testimony under oath on several occasions. Judge Nixon's motion for a new trial

based on these and other issues is currently on appeal to the Fifth Circuit (No. 89-4127, argued on June 5, 1989).

2. On May 10, 1989, the House of Representatives adopted three Articles of Impeachment against appellant Nixon. The Articles of Impeachment allege that Nixon made false statements to a grand jury and to federal officials in 1984.

3. Judge Nixon faces trial before a committee of twelve senators beginning on September 6, 1989. The use of a committee to conduct the Senate trial is in flat violation of Article I, section 3, clause 6, of the Constitution, which states that the Senate shall "try all Impeachments." Indeed, the Senate never used such a trial in impeachment cases until 1986.

4. Appellant Nixon intervened in the District Court in an action brought by Judge Hastings that raised eleven claims, including a challenge to the constitutionality of trial by Senate committee. Nixon's Motion to Intervene and his Complaint, however, raised only the constitutionality of the committee mechanism.

5. On July 5, 1989, Judge Gerhard Gesell entered final judgement in the case pursuant to Federal Rule of Civil Procedure 65(a), and dismissed all claims. See Attachment 1. Judge Gesell's opinion never even mentioned Powell v. McCormack, 395 U.S. 486 (1969), the Supreme Court precedent that establishes our right to a ruling on the merits of the

constitutional issue. Nor did his opinion examine the text of the Constitution or the intent of the Framers. (See Attachment 2.) We have filed our notice of appeal from that final judgment today.

6. On July 7, 1989, Judge Hastings filed a Notice of Appeal in the District Court and also filed in this Court an Emergency Motion for Injunction Pending Appeal and Expedited Consideration of the Merits Without Further Briefing. These motions were denied by Order dated July 7, 1989 (No. 89-5188), signed by Judges Ruth B. Ginsburg, Silverman and Sentelle, which order stated that Judge Hastings had not shown the "requisite likelihood of success on the merits to warrant either injunctive relief pending appeal or expedition." Unlike Judge Hastings, we do not seek such extraordinary relief; rather, we seek only expedited briefing and argument.

7. Nixon can effectively present his case in the impeachment trial only if those who try him -- that is, the entire Senate -- can see and hear for themselves the demeanor of the witnesses against him, exactly as the Framers of the Constitution intended.

8. Because of the gravity of the issues presented and because the date of the trial before the Senate Committee is already fixed for September 6, we ask this Court to accelerate the briefing and argument on this appeal. We are prepared to file our appellate brief on July 14; leaving time

for the appellees' response and our reply, the briefing could be concluded by the end of July and the case argued in early August. This schedule would permit a ruling on the important issue raised here before the Senate Committee begins its proceedings on September 6.

Respectfully submitted,

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Date: July 10, 1989

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5191

September Term, 19 88

C.A. No. 89-1602-GAG

United States Court of Appeals
For the District of Columbia Circuit

FILED JUL 12 1989

CONSTANCE L. DUPRÉ
CLERK

Walter L. Nixon, Jr.,

Appellant

v.

The United States Senate, et al.,

Appellees

89-5188

Alcee L. Hastings,

Appellant,

and

Walter L. Nixon, Jr.,

Intervenor,

v.

The United States Senate, et al.,

Appellees

BEFORE: Ruth B. Ginsburg and Silberman, Circuit Judges

ORDER

Upon consideration of the emergency motion for acceleration of briefing and oral argument filed by Judge Walter L. Nixon, Jr., it is

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5191 September Term, 19 88

ORDERED that the motion be denied. Appellant has not demonstrated that expedition is warranted in this case. See D.C. Circuit Handbook of Practice and Internal Procedures 40 (1987).

The Clerk is directed to schedule the above-captioned cases on the same day before the same panel in the first appropriate place on the fall calendar. The Clerk is further directed to place a copy of this order in each of the above-captioned files.

Per Curiam

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STATES COURT OF APPEALS

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the District of Columbia Circuit
FILED JUL 1 4 1989
CONSTANCE L. DUPRÉ
CLERK

WALTER L. NIXON, JR.,
Appellant,
v.
The UNITED STATES SENATE, et al.,
Appellees.

No. 89-5191

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(p+m-14)

APPELLANT'S RENEWED EMERGENCY MOTION FOR ACCELERATED BRIEFING AND ARGUMENT

Appellant Walter L. Nixon, Jr., through his undersigned counsel, hereby renews his motion for acceleration of briefing and argument in this case, and in support of this motion states the following:

1. By decision dated July 5, 1989, the District Court denied Nixon's constitutional challenge to the use of committee of twelve senators to conduct the trial of the Articles of Impeachment currently pending against him. On July 10, 1989, Nixon filed a Notice of Appeal with the District Court and moved in this Court for acceleration of briefing and argument. By order dated July 12, 1989, this Court denied the requested acceleration of briefing and argument.

2. Today, along with the filing of this Motion, Nixon is filing his principal brief on appeal. This brief details the errors of the District Court in applying the political question doctrine, in interpreting the Speech or Debate Clause, and in failing to give effect to the text of the Impeachment Clause and the intent of the Framers that impeachment trials be conducted before the full Senate.

3. The constitutional issue presented in this case is critically important. Nixon faces trial by a Senate committee on September 6, 1989. Without the requested acceleration of briefing and argument, Nixon will have to undergo the trial process before this Court even hears this appeal. Indeed, under the current schedule it is likely that the entire impeachment process will be completed before this Court can rule on this appeal.

4. As a result, if this Court does not accelerate briefing and argument, it either will moot Nixon's constitutional claim, and thereby effectively deny it, or else will face the even more difficult constitutional decision whether the Senate should be ordered to try Nixon a second time -- this time before the full Senate. Either outcome would cause irreparable injury to Nixon. Both outcomes are entirely unnecessary, since there is adequate time to permit the parties to conclude briefing and argue the case before the September 6 trial date.

For all of the foregoing reasons, and because of the irreparable injury threatened to Nixon in this case of great public concern, we entreat the Court to reconsider its order denying acceleration of briefing and argument, and to order that briefing be completed by the end of July, with argument in early August.

Respectfully submitted,

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Date: July 14, 1989

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5191

September Term, 1988

C.A. No. 89-1602-GAG

Walter L. Nixon, Jr.,

Appellant

v.

The United States Senate, *et al.*,

Appellees

United States Court of Appeals
For the District of Columbia Circuit

FILED JUL 18 1989

CONSTANCE L. DUPRÉ
CLERK

BEFORE: Ruth B. Ginsburg and Silberman, Circuit Judges

ORDER

Upon consideration of appellant's renewed emergency motion for accelerated briefing and argument, it is

ORDERED that the motion be denied. Nothing in appellant's current filing warrants altering the court's order of July 12, 1989.

Per Curiam

RBG
LHS

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

The Honorable ALCEE L. HASTINGS)
U.S. District Judge,)

Appellant,)

v.) CA NO. 89-5188

The UNITED STATES SENATE)
The IMPEACHMENT TRIAL COMMITTEE)
Established Pursuant to)
Senate Resolution 38, and)
The Honorable WALTER J. STEWART)
Secretary of the)
United States Senate)
The Honorable JOSEPH E. JENIFER)
as Acting Public Printer)
of the United States,)

Appellees.)

APPELLANT'S STATEMENT OF THE ISSUES TO BE RAISED ON APPEAL

Appellant United States District Judge Alcee L. Hastings raises the following issues for review:

1. Does the constitutional assignment of "the sole Power to try all impeachments" to "The Senate" and the requirement that "when sitting for that Purpose, [all Senators] shall be on Oath and Affirmation" and the manner in which that power has been exercised require that the full Senate sit for the trial of an impeachment on accusations against an article III judge which have been rejected by a jury or never been tried in any forum?

2. Does the Constitution preclude the use of the impeachment power to diminish a federal judge's compensation in office or, at a minimum, require that funds be provided sufficient to enable an accused judge to obtain the effective assistance of counsel and meet other costs incident to defending himself at the trial of his impeachment?

3. Does the Constitution preclude the use of impeachment to retry accusation of which a judge has been acquitted upon the verdict of a jury, especially in view of the express exception for a "Party convected" included in the Constitution and of the explicit rejection of a broader exception of "cases of impeachment" that the House proposed to include in the double jeopardy clause of the Fifth Amendment?

4. Do the requirements of due process preclude the retrial by the Senate of accusations that were rejected by a jury where the articles were not adopted or exhibited until more than five years after the jury's verdict and where the intervening delay has substantially and irreparably impaired the accused's ability to gather and present evidence for a second defense?

5. Must the essential requirements of the fundamental fairness and due process by observed by the Senate in the trial of an

impeachment, if so, can the actions taken by the Impeachment Trial Committee be reconciled with those requirements?

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ROBERT S. CATZ, hereby certify that a copy of this pleading was duly served via U.S. Mails upon counsel at the following address:

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Dated: July 17, 1989
Washington, D.C.

ROBERT S. CATZ

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5188

The Honorable **ALCEE L. HASTINGS**
U.S. District Judge,
Appellant,

v.

The **UNITED STATES SENATE**,
The **IMPEACHMENT TRIAL COMMITTEE**,
Established Pursuant to
Senate Resolution 38,
The Honorable **WALTER J. STEWART**
Secretary of the
United States Senate, and
The Honorable **JOSEPH E. JENIFER**
As Acting Public Printer
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Appellees.

On Appeal From A Final Decision Of The
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Parties

Plaintiff-Appellant No. 89-5188	Judge Alcee L. Hastings
Intervenor-Appellant No. 89-5191	Walter L. Nixon, Jr.
Defendant-Appellees Nos. 89-5188/5191	The UNITED STATES SENATE, The IMPEACHMENT TRIAL COMMITTEE Established Pursuant to Senate Resolution 38, The Honorable WALTER J. STEWART, Secretary of the United States Senate, and The Honorable JOSEPH E. JENIFER As Acting Public Printer of the United States

Rulings Under Review

Hastings v. United States Senate, et al., No. 89-1602 (D.D.C. July 5, 1989) (Gesell, J.).

Related Cases

None pending. The background of the underlying case has been developed in decisions by the courts spanning almost seven years:

United States v. Hastings, 681 F.2d 706, *reh'g en banc denied*, 689 F.2d 192 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983); *In re Petition to Inspect and Copy Grand Jury Material*, 576 F. Supp. 1275 (S.D. Fla. 1983), *aff'd*, 735 F.2d 1261 (11th Cir.) (special panel), *cert denied* 469 U.S. 884 (1984); *Hastings v. Judicial Conference of the United States*, 593 F.Supp. 1371 (D.D.C. 1984), *vacated*, 770 F.2d 1093 (D.C. Cir. 1985), *cert. denied*, 477 U.S. 904 (1986); *In re Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488 (11th Cir.) (special panel) [original proceedings and *aff'g Williams v. Mercer*, 610 F.Supp. 169 (S.D. Fla. 1983)], *cert. denied*, 477 U.S. 904 (1986); *Hastings v. Judicial Conference of the United States*, 657 F.Supp. 672 (D.D.C. 1986), *aff'd in part and rev'd in part*, 829 F.2d 91 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 1487 (1988); *In re Grand Jury Proceedings of Grand Jury No. 81-1*, 669 F.Supp. 1072 (S.D. Fla.), *aff'd*, 833 F.2d 1437 (11th Cir. 1987) (special panel); *In re Grand Jury 86-3*, 673 F.Supp. 1569 (S.D. Fla. 1987), *aff'd*, 841 F.2d 1048 (11th Cir.) (special panel), *stay denied*, 108 S.Ct. 1461 (1988).

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Senate Committee on Rules and Administration, Procedure for the Impeachment Trial of U.S. District Judge Alcee L. Hastings in the United States Senate, S. Rep. 1, 101st Cong., 1st Sess. 7, 8

I. JURISDICTION

This Court has jurisdiction over this appeal from the final order of the district court for the District of Columbia pursuant to 28 U.S.C. § 1291.

II. STATEMENT OF THE ISSUES

1. Whether the District Court erred in ruling that Judge Hastings's challenge to the constitutionality of Senate Impeachment Rule XI on its face and as applied constitutes a non-justiciable political question.

2. Whether the District Court erred in ruling that Impeachment Trials and the sanctions that issue therefrom are not criminal in nature and consequently, principles of double jeopardy do not apply.

3. Whether the District Court erred in ruling that the diminution of Judge Hastings's salary during continuance in office does not violate the Compensation Clause of Article III, § 1 of the Constitution of the United States.

4. Whether the District Court erred in ruling that the inordinate delay in the presentment of Articles of Impeachment to the Senate does not violate due process of law.

III. STATEMENT OF THE CASE

A. Course of the Proceedings

This is an appeal from an action filed June 1, 1989, on behalf of United States District Judge Alcee L. Hastings, in the district court for the District of Columbia seeking declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.

Judge Hastings applied, pursuant to Rule 65(a) and (b), Fed. R. Civ. P., for temporary and preliminary injunctive relief, pending the trial of his claims. The requested relief was denied and the complaint dismissed by order of the district court for the District of Columbia, Honorable Gerhard A. Gesell, dated July 5, 1989.[1]

B. The Nature of the Action

Judge Hastings brought this action in the district court for the District of Columbia seeking a judicial determination whether considerations of efficiency and expediency justify overriding the requirements for the trial of an impeachment established by the Constitution and embodied in a two-hundred year old tradition. Judge Hastings's complaint maintained that the impending impeachment trial violates his rights under the Constitution of the United States, individually and as an Article III judge (1) to have the trial of his impeachment heard before the full Senate; (2) to an undiminishable salary during continuance in office; (3) to not be placed twice in jeopardy of legal penalties for the same accusation; and (4) to basic concepts of timeliness and fundamental fairness embodied in the due process clause of the Fifth Amendment.

Specifically, the Senate, by resolution, decided to use an Impeachment Trial Committee to retry in 1989 the accusations of which a jury acquitted Judge Hastings in 1983. The Impeachment

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[1] Hastings v. United States Senate, et al., No. 89-1602-GAG (D.D.C. July 5, 1989).

Trial Committee further reduced the number of Senator-jurors who would actually be required to hear all the evidence by imposing a burden-shifting, mandatory stipulation on the accused and inviting the parties to submit testimony given in prior proceedings in lieu of live testimony. (A. 119, 129-31; 251-55, 258-61).[2] Further reducing the time and attention that individual Senators needed to devote to the trial of this impeachment, the Senate authorized, and the committee retained, a special staff -- a committee administrator, two counsel, and two legislative assistants -- to aid in processing the case to conclusion. (A. 52, 262). In contrast, after the committee had been informed that Judge Hastings had less than $10,000 available for his defense (A. 133-34), it decided, notwithstanding his Compensation Clause claim, that his request for funds should be deferred until the conclusion of the trial. (A. 157).

Invoking various doctrines of justiciability, the Senate, in opposition to Judge Hastings's motion for preliminary injunction, moved to dismiss the complaint. Argument on the motions was heard on June 29, 1989. On July 5, 1989, Judge Gesell entered the order from which Judge Hastings now appeals denying the requested relief and dismissing the complaint. Judge Hastings noticed his appeal of that ruling on July 7, 1989. Simultaneously, an application for an emergency stay was submitted to this Court and subsequently was denied. Additional requests for emergency relief were denied by the Supreme Court. Consequently, on July 10, 1989, the Impeachment Trial Committee commenced proceedings against Judge Hastings pursuant to the actions challenged herein. This appeal seeks a judicial declaration that these actions do not comport with the requirements of the Constitution, and consequently, that the district court erred in denying the requested preliminary relief and in dismissing the complaint.

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[2] References to "A" are to the Appendix to Plaintiff's Motion for Preliminary Injunction in the Record before the district court. References to "JA" are to the Joint Appendix of the parties submitted before this Court.

C. The Factual Background

The claims asserted in this action are the culmination of a process that began more than seven years ago. In 1981, the Justice Department and its Federal Bureau of Investigation launched an undercover sting operation to develop evidence that might lead to the judge's conviction on charges of conspiracy to accept a bribe or otherwise force him from the bench (A. 208-11, 222-50). Judge Hastings claimed then that the Constitution required that impeachment by the House and trial and conviction by the Senate precede the exercise of prosecutorial discretion by the executive and jurisdiction by the courts to determine whether a judge had committed high crimes and misdemeanors. The courts rejected this claim,[3] and the House did not assert its powers of impeachment at that time.

As a result, the government had eighteen months to gather and marshall its evidence for trial. Judge Hastings submitted to that trial in the forum chosen by his accusers. The case was tried and argued to a jury, and on February 4, 1983, the judge was acquitted upon the unanimous verdict of the jury.[4] Judges who served on the court of appeals that ordered Judge Hastings to commit his fate to the jury were not prepared, however, to abide by the result. The then-chief judge of the circuit invited and two members of the circuit judicial council -- *before* a transcript of the jury trial was even available -- submitted a complaint pursuant to the newly enacted Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the "1980 Act")[5]. The filing of that complaint initiated a three-and-a-half year investigation during which the judiciary paid more than $800,000 in fees and costs to the specially retained counsel who aided in their work.[6] With extensive assistance from the FBI (A. 199-201, 208-11), the judiciary re-marshalled the evidence to support its conclusion that the judge had been a participant in the 1981 conspiracy and that, as the prosecutors had argued, the testimony he had given at his 1983 trial was false and misleading.[7] In due course, the Judicial Conference certified these determinations, and the report and record prepared to support them, to the House.[8]

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[3] United States v. Hastings, 681 F.2d 706, reh'g en banc denied, 689 F.2d 192 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983).

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[4] *See*, *e.g.*, House Comm. on the Judiciary, *Impeachment of Judge Alcee L. Hastings*, H. Rep. 810, 100th Cong., 2d Sess. 7-8 (1988) ("House Committee Report").

[5] Pub. L. No. 96-458, 94 Stat. 2035 (1980), *codified as amended at* 28 U.S.C. §§ 331, 332, 372 (c), 604(h) (1982 & Supp. 1984); *see also* House Subcommittee on Criminal Justice, *Impeachment Inquiry Hearings (Hastings)* at 287-88, 294, 304 (Comm. Print 1988) ("*Impeachment Inquiry Hearings*").

[6] *Impeachment Inquiry Hearings* at 285 (Testimony of John Doar).

[7] House Committee Report at 7-8.

The House expressed neither interest nor concern when the executive published its accusations in 1981. The House continued to sit on its hands after the trial and acquittal in 1983. The certification by the Conference in 1987, however, changed the political reality. The House promptly referred the matter to its Committee on the Judiciary. That committee retained four special counsel with appropriate support staff and assigned responsibility for the inquiry to its Subcommittee on Criminal Justice. During the year in which this special staff examined the record and sought additional evidence, Judge Hastings was excluded from the process, notwithstanding his repeated requests that action be taken to assure a balanced inquiry.[9]

The one-sided record so compiled made it possible for the House to take swift action. Before the record was printed, the Judiciary Committee recommended and the House adopted seventeen articles of impeachment.[10] The first fifteen restated the essential accusations that had been made at the 1983 trial -- that Judge Hastings had in fact been a participant in the alleged 1981 bribery scheme (article I), and that the testimony that he had given in his 1983 trial was false and misleading (articles II - XV).[11] The House exhibited these articles in the Senate on August 9, 1988.

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[8] Id.

[9] House Committee Report at 9-12; See also, Submissions By Judge Hastings, Appendix III to Impeachment Inquiry Hearings ("App. III") at 1-48 (for a more detailed account with supporting documentation). Predictably, having been provided with a record compiled and certified by the judiciary, the Subcommittee's inquiry was unlike that which had characterized its inquiries into the conduct of federal judges earlier in the century. See App. III at 1-30, 47-57, 244-50 (for a description of subcommittee procedures and House precedents). See also Impeachment Inquiry Hearings at 15-133, 226-86 (listening to testimony of John Doar recounting evidence); A. at 251-89 (refusing and failing to call witnesses, including those requested by Judge Hastings).

From the outset of the proceedings in the Senate, Judge Hastings asserted that the Senate could not properly invoke the kinds of summary procedures for the trial of his impeachment as were invoked for that of a convicted Judge Harry E. Claiborne. He asserted that the Constitution precluded the use of impeachment to re-examine accusations upon which a jury had acquitted the accused.[12] Of more critical import, he argued that the Constitution did not permit the Senate or its members to delegate their responsibility to hear and examine the evidence to a committee, certainly not in an impeachment that involved accusations that a jury had unanimously rejected after it heard and examined that evidence directly, and accusations in which the credibility of the witnesses was central to a proper adjudication.[13] The Senate, however, denied Judge Hastings's motions to dismiss and established the Impeachment Trial Committee to conduct pre-trial proceedings, to receive evidence, and report on undisputed and disputed facts (A. 45-48).

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[10] House Committee Report at 12-13; see also Senate Committee on Rules and Administration, Procedure for the Impeachment Trial of U.S. District Judge Alcee L. Hastings in the United States Senate, S. Rep. 1, 101st Cong. 1st Sess. at 3 ("Senate Committee Report").

[11] House Committee Report at 1-4, 7-8, 41-56; App. III at 308.

[12] See, e.g., Senate Committee Report at 21-38, 47-49.

The essential, underlying facts are set forth in some detail in the complaint filed before the district court, and attached as exhibit 1 to the Joint Appendix. The background is developed in decisions by the courts spanning almost seven years,[14] in the records compiled through the House inquiry,[15] and in the Senate proceedings to date.[16] Throughout these proceedings, a perceived need to avoid distractions from the legislative business of the Senate has provided the incentive for encroachments on and departures from the constitutional structure established to maintain the independence of the courts and the proper allocation and separation of powers.

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[13] Id.

[14] United States v. Hastings, supra; In re Petition to Inspect and Copy Grand Jury Material, 576 F. Supp. 1275 (S.D. Fla. 1983), aff'd, 735 F.2d 1261 (11th Cir.) (special panel), cert denied 469 U.S. 884 (1984); Hastings v. Judicial Conference of the United States, 593 F.Supp. 1371 (D.D.C. 1984), vacated, 770 F.2d 1093 (D.C. Cir. 1985), cert. denied, 477 U.S. 904 (1986); In re Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit, 783 F.2d 1488 (11th Cir.) (special panel) [original proceedings and aff'g Williams v. Mercer, 610 F.Supp. 169 (S.D. Fla. 1983)], cert. denied, 477 U.S. 904 (1986); Hastings v. Judicial Conference of the United States, 657 F. Supp. 672 (D.D.C. 1986), aff'd in part and rev'd in part, 829 F.2d 91 (D.C. Cir. 1987), cert. denied, 108 S.Ct. 1487 (1988); In re Grand Jury Proceedings of Grand Jury No. 81-1, 669 F.Supp. 1072 (S.D. Fla.), aff'd, 833 F.2d 1437 (11th Cir. 1987) (special panel); In re Grand Jury 86-3, 673 F.Supp. 1569 (S.D. Fla. 1987), aff'd, 841 F.2d 1048 (11th Cir.) (special panel), stay denied, 108 S.Ct. 1461 (1988).

[15] House Committee Report; Impeachment Inquiry Hearings with Appendices I-V.

[16] See, e.g., Senate Committee Report and materials included in the Appendix to Plaintiff's Motion for Preliminary Injunction.

The Constitution confers powers and it sets limitations. By the decision of the District Court, the Senate is authorized to exercise its constitutionally conferred power to try impeachments in a manner that is at odds with the most basic concepts of justice and fairness. Accordingly, this Court should reverse the judgment of the district court.

IV. SUMMARY OF ARGUMENT

Judge Hastings's complaint raised four essential claims: (1) that an impeachment trial before a select committee of 12 Senators violates the express constitutional commitment of the sole power to try impeachments to the Senate; (2) that the documented diminution of his salary during continuance in office in defense and as a direct result of a disciplinary complaint initiated pursuant to the 1980 Act violates the Compensation Clause of the Constitution; (3) that the principles of double jeopardy bar retrial of the first fifteen Articles of Impeachment, which merely restate the charges on which he had been duly acquitted before a jury in a court of law; and (4) that the delay by the House in presenting Articles of Impeachment to the Senate violates due process and fundamental fairness.

The decision of the District Court concludes that Judge Hastings's claims are barred by various doctrines of justiciability, or are otherwise unmeritorious. In addressing the issue of the responsibility of the full Senate to try this impeachment, the district court concludes that the full Senate is not precluded from participation. In this regard, the district court does not consider the word "try" as requiring anything more of individual Senators than an obligation to vote. The district court further concludes that "impeachment proceedings are wholly committed to Congress under the Constitution,"[17] and therefore, that "[a]bsent evidence that the Senate is violating the Constitution, the Court should stay its hand."[18] Noting that the use of the Committee is not a "new idea," the district court skirts the ultimate question whether that "idea" is indeed constitutionally permissible. Judge Hastings argues below that the district court erred in dismissing this claim as non-justiciable. The text of the Constitution, the framers's intent and the caselaw establish that neither the commitment to the Senate to try all impeachments nor the conferral onto that body of rulemaking power with respect to its proceedings are without limitation. Commitment of the trial responsibility to a committee of twelve violates the express mandate to all Senators to sit on oath and affirmation in the trial of an impeachment and impermissiby infringes upon the judge's right to due process.

The district court further summarily concludes that the diminution of Judge Hastings's salary during continuance in office offends no principles of constitutional law. Judge Hastings argues below that the Constitution requires that his salary not be diminished during his continuance in office notwithstanding the outcome of this impeachment trial. The framers intended that the independence of the judiciary be maintained by limiting the methods by which judges could be removed and by guaranteeing their compensation while in office. Judge Hastings was and is entitled to undiminished compensation throughout his term in office. Thus, the diminution in his salary experienced as a direct result of the complaint process authorized by the 1980 Act violates the Compensation Clause.

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[17] Hastings v. United States Senate, et al., No. 89-1602-GAG (D.D.C. July 5, 1989), at 4.

[18] Id.

Judge Hastings also challenges the district court's determination that impeachment proceedings and the sanctions issued therefrom are not criminal in nature. Although, impeachments may be viewed in part as remedial, they are clearly and distinctively punitive as well. The Constitution and its history demonstrate that the framers understood both the political and punitive nature of impeachments and sought to synthesize both. By affording some flexibility to Congress in developing Articles of Impeachment, the framers did not sanction constitutional abuses. In the factual context of this case, the first fifteen Articles of Impeachment against Judge Hastings seek to relitigate charges on which he has previously been acquitted. As such, reprosecution before the Senate on these charges is barred by double jeopardy constraints.

In addition, Judge Hastings challenges the extraordinary and prejudicial delay by the House in presenting Articles of Impeachment to the Senate. To that end Judge Hastings demonstrates that the failure of the House to initiate this case of impeachment in a timely fashion warrants the dismissal of the first fifteen Articles of Impeachment. Finally, Judge Hastings argues that the decision of the district court improperly concludes that impeachment proceedings before the United States Senate are without constitutional restraints and immune from judicial review. The Constitution intended that the process of impeachment be a burdensome one, not only for the accused judge, but for the body that would decide his or her fate. Without these constraints, the balance of power will shift decidedly in favor of the legislature and the independence of the judiciary and our constitutional structure will suffer.

V. ARGUMENT

A. The Constitution Requires that the Full Senate Sit for the Trial of Appellant's Impeachment.

Adopted by the United States Senate Committee on Rules and Administration in 1935, and invoked only once in the United States history, Rule XI permits the appointment of "a committee of twelve Senators to receive evidence and take testimony at such times and places as the committee may determine . . . ." See Rule XI of the Rules of Procedure and Practice in the Senate When Sitting in Impeachment Trials ("Rule XI"), attached as Appendix 1 to Brief of Appellant, Walter L. Nixon, No. 89-5191. The application of Rule XI in the trial of this impeachment violates fundamental

principles of constitutional law for at least three reasons: (1) the Rule is patently unconstitutional; (2) it exceeds the rulemaking authority of the Senate in that it infringes upon substantial rights; and (3) application of Rule XI to the impeachment trial of accusations on which the accused judge has previously been acquitted in a court of law violates due process. For the reasons set forth below, the district court erred in determining that the constitutionality of Rule XI is beyond judicial review.

1. Rule XI Is Unconstitutional

The Constitution commits to the Senate the "sole power to try all impeachments." U.S. Const., art. I, § 3, cl. 1. The Constitution further provides that the Senators "[w]hen sitting for that purpose . . . shall be on oath and affirmation." Both the text of the Constitution and the historical development and promulgation of Rule XI illustrate that the origins of and the objectives underlying Rule XI are contrary to the framers's intent and far exceed the scope of power conferred to the Senate.

In committing the sole power to try impeachments to the Senate, the framers understood the awesome responsibility that attached to that right. They recognized that such responsibility -- if it were to assure that the objective of judicial independence was not jeopardized -- must reside in a body large enough and secure enough to carry out responsibly its task.[19]

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[19] That reasoning convinced the framers to reject the Supreme Court as the appropriate tribunal to try impeachments. Instead, Hamilton maintained that the perceived problems with

Speaking in support of the Senate, Hamilton noted:

> What other body would be likely to feel confidence enough in its own situation, to preserve unawed and uninfluenced the necessary impartiality between an individual accused, and the representatives of the people, his accusers?
>
> . . .
>
> The necessity of a numerous court for the trial of impeachments is equally dictated by the nature of the proceeding. . . . There will be no jury to stand between the Judges, who are to pronounce the sentence of the law and the party who is to receive or suffer it. The awful discretion, which a court of impeachment must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons.[20]

Thus, to preserve the aims of judicial independence while simultaneously providing an effective means to monitor and sanction judicial transgressions, the framers deliberately chose a body confident enough in its own situation to execute its awful and substantively unreviewable discretion with the internal check and balance of numerosity. That the framers so intended is fortified by its provision of a special oath by each and every Senator when sitting for a trial of impeachment. To assume otherwise is to render that oath requirement entirely superfluous.[21] There can be no other interpretation than that the

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vesting such authority in a body so small and insular "could only be avoided, if at all, by rendering the tribunal more numerous than would consist with a reasonable attention to economy." The Federalist No. 65 at 398.

[20] The Federalist No. 65 at 441-442 (emphasis in original in first paragraph, supplied in second).

[21] Members of Congress are sworn by oath of office to uphold the Constitution. *See* U.S. Const., art. VI, cl. 3.

responsibility to "try" resides with each individual Senator.

That obligation is better understood and reinforced by an examination of the constitutional framework and its commitment to fundamental fairness and judicial independence. So examined, it becomes clear that the framers understood and yet nonetheless opted for the imposition of a burdensome mechanism for the removal of federal judges. First, the very framers who committed to "[t]he Senate" the "sole power to try all impeachments," identified that body as consisting of "two Senators from each State," each having one vote.[22] The framers further provided for the admission of New States to the Union.[23] Thus, when the framers bestowed upon the Senate the awesome power to try all impeachments, they were fully aware of and specifically anticipated the growth and expansion of that body.

Nor did the framers leave a contemporary Congress without recourse if the constitutional plan proved overwhelmingly inconvenient or unmanageable. "Each House . . . may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide."[24] Thus, where individual members are required by the Constitution to perform certain functions where their attendance is required, the framers expressly conferred upon the body the power to compel compliance. That the framers envisioned enforcement of this provision in trials of impeachment can be gleaned from their emphasis on the need for a numerous body to carry out that awesome responsibility.

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[22] U.S. Const., art. 1, § 3, cl. 1.

[23] U.S. Const., art. IV, § 3, cl. 1.

[24] U.S. Const., art. I, § 5, cl. 1.

Finally, the framers also provided, should their plan be deemed wholly unworkable, for the amendment of the Constitution to reflect the current will of the people.[25] Similarly, the Congress is authorized pursuant to the "necessary and proper" clause[26] to make all laws necessary to the execution of the powers conferred by the Constitution. Both methods are designed to maintain the appropriate checks and balances which lie at the core of a democratic government.

For the first 150 years officials in all three branches exhibited a shared understanding of the interfacing of the constitutional provisions adopted to guarantee the independence of federal judges through the tenure and compensation guarantees and the intentionally cumbersome processes of impeachment by the House and trial by the Senate by which those guarantees could be terminated. During that period, the House and the Senate accepted and discharged the duties imposed upon them by the Constitution. The House conducted more than forty inquires into the conduct of federal judges, almost all of them inquiries directed at the conduct of trial court judges.[27] During that period, the House impeached ten judges and exhibited its articles to the Senate. During that period, the full Senate tried judges. It acquitted five, and convicted four.[28] There were complaints then about the burdens imposed upon the Senate's legislative time by impeachment trials of district court judges.[29] Those complaints notwithstanding, throughout that period, the Senate accepted the responsibility assigned it by the Constitution and executed it in accordance with established precedent.

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[25] U.S. Const., art. V., cl. 1.

[26] U.S. Const., art. 1, § 8, cl. 18.

[27] See, e.g., House Committee on the Judiciary, Impeachment: Selected Materials on Procedure, 93rd Cong., 2d Sess. (Comm. Print 1974) [hereinafter "Impeachment Procedures"] (accurate but incomplete listings).

Notwithstanding the constitutional plan and the historical adherence to that plan, both the Congress and the district court have determined that the Senate's "sole power to try all impeachments," includes the unfettered power to determine the procedures -- including the delegation through rulemaking of its responsibility to hear testimony and take evidence to a committee -- by which it exercises its authority. That determination is clearly erroneous. The Senate cannot by rulemaking fiat alter and amend its obligation under the Constitution.[30] Senatorial desires for convenience and efficiency cannot override the demands of the Constitution. "Convenience and efficiency are not the primary objectives --or the hallmarks-- of democratic government."[31]

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[28] See Impeachment Procedures v. (for list of trials through 1933). The last full trial in the Senate was that of Judge Ritter in 1936, the year Rule XI was promulgated.

[29] See, e.g., Proceedings of the United States Senate in the Trial of Impeachment of Harold Louderback, 72nd Cong., 2d Sess. & 73rd Cong., 1st Sess., 10-12 (complaints by Senator Long about the Senate "fiddling its time away over a little impeachment fiasco" concerning "some judge in California").

[30] Moreover, as documented in the brief of Appellant, Walter L. Nixon, the constitutional problems of Rule XI were fully recognized by its sponsors.

2. Rule XI Infringes Upon Fundamental Rights

Supreme Court precedent further establishes that the authority of the Senate to promulgate rules incident to the execution of its textually conferred powers is not an unbridled authority:

> The Constitution empowers each house to determine its rules of proceeding. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained.[32]

The grounds raised in justification for Rule XI cannot be reconciled with the principles underlying the Constitution or the limitations placed upon the Senate's rulemaking authority. The irrationality of Rule XI and its impermissible and singular goal of merely easing the personal burden of individual Senators -- without regard to the fundamental rights of the accused judge or the constitutional obligation of the Senators -- is exemplified by the reasons advanced for the adoption and/or application of the Rule.

During the impeachment trial of Judge Claiborne, for example, Senators argued that it was, in effect, unnecessary for the full Senate to sit upon the trial of a convicted judge. Conversely, the House maintained and the Senate concurred that the trial of this impeachment -- that of an acquitted judge -- by its nature and complexity suggests the use of a Rule XI committee to facilitate a more in depth examination. Judge Hastings is further assured that the provision of daily transcripts and video tapes of the proceedings will insure the type of informed judgment by each Senator contemplated by the Constitution. Logic defies the notion, however, that those Senators who were improperly relieved of their obligation to sit through the impeachment trial -- due to competing legislative tasks -- will now lay those tasks aside to read the volumes of transcripts and view the hours of video tape complied by the Impeachment Committee. Instead, and contrary to the clear intent of the framers, Judge Hastings's fate will be determined by a small number of Senators. Clearly, the purposes underlying Rule XI and the justifications for its invocation are irrational, arbitrary, self-serving and infringe both upon fundamental individual rights and core concepts of the Constitution.

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[31] Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 944 (1983).

[32] United States v. Ballin, 144 U.S. 1 (1892) (emphasis added).

3. Rule XI Violates Judge Hastings's Right to Due Process

Finally, the application of Rule XI to this impeachment is particularly offensive to rudimentary concepts of due process. The first fifteen articles of impeachment [illegible] by the House simply restate allegations which the 1983 jury heard and unanimously rejected. The Senate is now called upon to impeach a jury's verdict, a verdict reached by another constitutional institution serving in a coordinate branch of government. Those Senators who would repudiate the jury's verdict therefore must also hear the witnesses live; they must also observe their demeanor under examination and cross-examination; they must consider other evidence in the context of the testimony through which it is received; they must hear and consider the evidence against the background afforded by the opening statements made by the parties; and they must afford the parties the opportunity to address them in closing with confidence that they have heard and seen the evidence and can fully appreciate the arguments being advanced. To use the words of Judge Edwards more broadly, the choice

> made in the Constitutional Convention [may] impose burdens . . . that . . . seem clumsy, inefficient, even unworkable, but . . . [t]here is no support in the Constitution . . . for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards [i.e., impeachment (trials)] may be avoided, either by the Congress or by the [judiciary][33]

4. The Constitutionality of Rule XI Is Not A Political Question

Notwithstanding the clear choice made by the framers and respected by the Congress until 1986, the district court rejected Judge Hastings's and intervenor Nixon's constitutional challenges to Rule XI, in part on the ground that judicial review is barred by the political question doctrine, and in part on the ground that no constitutional rights would be violated.[34] Neither basis is supported by the applicable legal principles.

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[33] Hastings v. Judicial Conference, 770 F.2d 1093, 1099 (Edwards, J., concurring) (paraphrasing Chadha, 462 U.S. at 959)).

[34] See Hastings v. United States Senate, et al., No. 89-1602-GAG, supra at 5.

The most exhaustive exposition of the political question doctrine is found in Baker v. Carr, 369 U.S. 186 (1962). In Baker, the Court set forth for the first time a detailed framework within which to analyze political question cases. Justice Brennan, writing for the Court, observed:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments of one question.

369 U.S. at 217. Under Baker v. Carr, unless one of these formulations is inextricable to the case at issue, dismissal for nonjusticiability is inappropriate.

The opinion of the district court cursorily accepts the position of the Senate that the Constitution's commitment to "the Senate . . . the sole Power to try all Impeachments," requires a conclusion that its decision to try Judge Hastings by select committee is a nonjusticiable political question.[35] Accepting that the quoted clause commits solely to the Senate the power to determine whether an officer of the United States has committed an impeachable offense, it does not follow that the Senate has the unfettered right to exercise that power in any manner it sees fit.

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[35] See id. at 5-7.

The Senate's assertion of immunity from judicial review overstates both the Senate's authority and the constraints imposed by the political question doctrine. A similar argument was considered and rejected by the Supreme Court in Powell v. McCormack, 395 U.S. 486 (1969).

In Powell, the House of Representatives refused to permit Adam Clayton Powell to take his seat in the House on the grounds that he allegedly had asserted an unwarranted privilege and immunity from process in the New York courts, had made false reports of expenditures to the Committee on House Administration, and had misappropriated House funds for personal use. Powell challenged his exclusion in federal court. The district court dismissed the complaint for want of subject matter jurisdiction. The Court of Appeals affirmed the dismissal, but on the ground that the case represented a nonjusticiable political question. The Supreme Court reversed.

The House urged that the case presented a political question because Art. I, § 5, commits to the House the adjudicatory power to determine a member's qualifications. The House further argued that the power to "judge qualifications" and "punish" members, similar to the power of the Senate to "try" all impeachments, were explicit grants of judicial power to Congress, and thus were specific exceptions to the general mandate of Article III that the judicial power of the United States be vested in the federal courts. The Supreme Court rejected this contention. Writing for the Court, Justice Warren observed: If examination of § 5 disclosed that the Constitution gives the House judicially

> unreviewable power to set qualifications for membership and to judge whether prospective members meet those qualifications, further review of the House determination might well be barred by the political question doctrine. On the other hand, if the Constitution gives the House power to judge only whether elected members possess the three standing qualifications set forth in the Constitution, further consideration would be necessary to determine whether any of the other formulations of the political question doctrine are inextricable from the case at bar.

Powell, 395 U.S. at 520.

After an exhaustive historical and legal analysis, the Court concluded that Art. I, § 5, was at most a textually demonstrable commitment to Congress to judge only the qualifications expressly set forth in the Constitution. The Court determined that the historical evidence, although not completely clear, indicated that the framers were quite concerned about membership in the legislature and the possibility that a politically swayed Congress could restrict membership and thereby usurp the indisputable right of the people to elect whom they thought proper. Accordingly, the Court held that the issue was justiciable and that the exclusion of Representative Powell by the House was unconstitutional.

Applying these principles to the instant case, the district court's conclusion that Judge Hastings's challenge to Rule XI is beyond judicial review can withstand scrutiny only if the Constitution commits to the Senate the power to try an impeachment by Committee. As the Supreme Court stated in Baker v. Carr,

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, [which the courts must decide.]

365 U.S. at 211. Here, although the district court seemingly

concludes that a textual commitment to try by committee exists, it does so by merely deferring the "delicate exercise of constitutional interpretation" to the Senate. As in Powell, however, when read in its totality, the Constitution makes clear that no authority to try impeachments by committee has been textually conferred upon the Senate.[36]

Nor are any of the other factors set forth in Baker v. Carr, inextricable to the issues presented here. First, Judge Hastings's Rule XI challenge requires no more than an interpretation of the Constitution for which there are clearly "judicially manageable standards." Surely, if judicially manageable standards exist to handle the complex problem of apportionment encountered in Baker v. Carr, they exist with regard to determining whether the Constitution permits the Senate to try an impeachment by select committee. Second, the possibility that a decision on the merits will express a "lack of respect due a coordinate branch of government" has never sufficed to bar judicial review. Indeed,

> [o]ur system of government requires that the federal courts on occasion interpret the Constitution in a

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[36] Indeed, the district court's opinion fails to set forth the limits on Congressional power in impeachments other than to summarily conclude that those limits have not been transgressed here. Clearly, if the Senate determined, for example, to further lessen its burdens, that the legal director of the Center for Constitutional Rights should henceforth determine all matters concerning impeachments, a constitutional violation would be evident. Constitutional violations, however, need not shock the conscience to be judicially cognizable. Consistent with Powell, the district court was obligated to determine what the Constitution requires, not what the Senate thinks the Constitution requires.

> manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the court's avoiding their constitutional responsibility.

Powell, 395 U.S. at 549. Instead, "it is the responsibility of this Court to act as the ultimate interpreter of the Constitution." Id. at 560 (citing Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803)).[37]

Moreover, the responsibility of the judiciary is even more pronounced, where, as here, the constitutional infraction involves individual rights. Succinctly put, the political question doctrine cannot be employed to bar judicial review of Congressional action that infringes upon individual rights. This concept has perhaps been expressed best by Professor Martin Redish.

> The entire premise of the amendment concept is that an amendment supersedes anything contained in the body of the Constitution that is inconsistent with the amendment's directives. Thus, even if a Constitutional provision vesting power in the political branches appears to be facially neutral as to how that power is to be exercised, it does not necessarily follow that all applications of that power are insulated from constitutional scrutiny.

Redish, Judicial Review and the "Political Question", 79 Nw. U.L.

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[37] The remaining factors enumerated in Baker v. Carr, -- "the need for adherence to political decisions already made" and "embarrassment from multifarious pronouncement by various departments" -- are clearly inapplicable here. The Supreme Court has held that neither formulation is applicable unless the case involves foreign agencies and relations. See Baker v. Carr, supra.; County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985).

Rev. 1031, 1041 (1985).[38] The distinction between a challenge based solely on Constitutional provisions which allocate power among the three branches and those which provide for individual rights is that in the former class of cases considerations of separation of powers which underlay the political question doctrine will generally be present. The latter class of cases, however, present unique questions surrounding the interpretation of the Bill of Rights; matters traditionally within the specific purview of the federal judiciary to adjudicate.

The framers intention that the Bill of Rights was to be enforced by the judiciary is clear. Madison noted:

> independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally let to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

1 Annals of Cong. 439 (1789). Consistent with these guidelines, the Supreme Court has held that where a litigant's challenge involves a constitutional construction of the Fifth or Fourteenth Amendment, the political question doctrine does not apply. See, e.g., Baker v. Carr, 369 U.S. at 227 (noting that although the plaintiffs "might conceivably have added a claim under the Guaranty Clause. . . . [that] could not have succeeded it does not follow that [Plaintiffs] may not be heard on the equal

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[38] This formulation is no different from the recognition by the Supreme Court of limitations on the Senate's rulemaking power in Ballin, supra.

protection claim which in fact they tender").[39]

In Davis v. Passman, 442 U.S. 228 (1979), petitioner -- a former deputy administrative assistant to Congressman Passman -- maintained that the Congressman dismissed her because of her sex and argued that her dismissal was thus a violation of the due process clause of the Fifth Amendment. The Court concluded that unless the Congressman was shielded by the Speech and Debate Clause, "the question of whether the . . . dismissal of petitioner violated her Fifth Amendment rights would . . . require no more than an interpretation of the Constitution." See 442 U.S. at 236 n.11. "Such a determination," the Court continued, "falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of respect due a coordinate branch of government,' nor does it involve an 'initial policy determination of a kind clearly for non-judicial discretion.'" 442 U.S. at n.11 (citations omitted).[40]

Gilligan v. Morgan, 413 U.S. 1 (1972), is the only recent case wherein the Court has found a claim nonjusticiable notwithstanding the plaintiffs' contention that the challenged federal action infringed upon individual rights. Gilligan, however, is clearly distinguishable from Judge Hastings's claims.

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[39] The Court had previously held that claims under the Guaranty Clause presented nonjusticiable political questions. See, Luther v. Bordon, 48 U.S. (7 How.) 1 (1849).

[40] Other cases suggest that the matter will be deemed justiciable when First Amendment rights are implicated. See, e.g., Sanders v. McClellan, 463 F.2d 894 (D.C. Cir. 1972); Davis v. Ichord, 442 F.2d 1207 (D.C. Cir. 1970).

Gilligan arose out of the shooting of several student demonstrators at Kent State University. There, the plaintiffs alleged that the defendants had violated the students' First and Fourteenth amendment rights as a result of a continuing pattern of policies and practices by the Ohio National Guard. When the case ultimately reached the Supreme Court, the Court held that the plaintiffs' claims were nonjusticiable. Declining plaintiffs' broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the National Guard,[41] the Court nonetheless made clear that it was not asserting the proposition that any conduct of the National Guard is always beyond judicial review. Nor did it intend that there be no accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel.[42]

Judge Hastings complaint before the district court alleged that the trial of his impeachment trial before a select committee of 12 Senators violates both Article I, § 3, cl. 6 of the Constitution and his Fifth Amendment right to due process. In one fell swoop, the district court without express consideration of the relationship between the individual liberties guaranteed by the Bill of Rights and the Senate's power to try impeachments, perfunctorily held that the committee procedure does not "violate any constitutional rights or offend fundamental notions of justice." The inescapable result, however, is that Judge Hastings is accorded fewer individual rights than is the average citizen. Moreover, and contrary to the suggestion by the district court, Judge Hastings requests no special treatment -- rather, he only demands that he be accorded the equal right to have his jurors present at his trial. Because Judge Hastings's claims are grounded upon individual liberties, the district court's dismissal of his challenge to Rule XI as either nonjusticiable or unmeritorious was erroneous and must be reversed.

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[41] See Gilligan, 413 U.S. at 7 ("The relief sought by respondents . . . [would require] initial judicial review and continuing surveillance by a federal court over the training, weaponry, and orders of the Guard. . .").

[42] Cf. Committee to Free Fort Dix 38 v. Collins, 429 F.2d 807, 811 (3d Cir. 1970) ("However broad a commander's discretion is 'patently arbitrary or discriminatory' decisions may be properly adjudicated.").

B. The Constitution Requires that the Senate Sitting for An Impeachment Provide Such Funds and Time as Are Necessary To The Proper Defense of An Accused Judge.

The Compensation Clause of the Constitution provides that judicial salaries " shall not be diminished during Continuation in Office." U.S. Const., art. III, § 1. By this provision, the framers sought to assure the people that other governmental officials could not undermine a judge's security and independence by depriving him or her of the emoluments of the judicial office. Hamilton expressly recognized that "a power over a man's subsistence amounts to a power over his will."[43] The compensation clause instructs every article III judge that he or she need "never be deterred from his [or her] duty by the apprehension of being placed in a less eligible situation."[44] Judicial independence is thus ensured by life tenure, and that tenure is protected by the compensation clause's guarantee against malicious or arbitrary salary reductions.

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[43] The Federalist No. 79, at 531 (emphasis in original).

[44] Id. at 532.

In committing the process of removal of federal judges exclusively to Congress, the framers consciously reinforced the decision to maximize and maintain the integrity of judicial independence.[45] The failure and refusal by Congress to provide Judge Hastings with adequate funds to pursue his defense is an affront to the principles underlying the compensation clause and to the clause itself. There can be no doubt that Judge Hastings's salary has been substantially reduced as a result of his defense to the articles of impeachment against him.[46]

The standard employed to determine whether such indirect reductions in judicial salaries violate the Compensation Clause is best articulated in Duplantier v. United States, 606 F.2d 654, 669 (5th Cir.) reh'g denied, 608 F.2d 1373 (1979), cert denied, 449 U.S. 1076 (1981):

> [i]ndirect, nondiscriminatory diminishments of judicial compensation, those which do not amount to an assault upon the independence of the third branch or any of its members, fall outside the protection of the Compensation

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[45] See, e.g., Ervin, Separation of Powers: Judicial Independence, 35 Law & Contemp. Probs. 108, 114 (1970).

[46] The provision of adequate funds is necessary (1) to assure that Judge Hastings's compensation is not diminished by these proceedings during his continuance in office, (2) to eliminate the resulting unfair handicaps under which he and his counsel have labored to date, and (3) to minimize the consequences of those handicaps in the future.

Clause.[47]

The substantial, though indirect, reductions in Judge Hastings's income can hardly be deemed "nondiscriminatory". At worst, those reductions are occasioned by his defense of charges brought against him as an independent and outspoken jurist. At best, they are occasioned by his defense of charges perfuntorily embraced by the House solely on the basis of the 1980 Act. Under either interpretation, an impermissible presumption is ascribed onto a specific category of judges -- (1) outspoken judges and (2) those subject to complaints under the 1980 Act -- who necessarily experience salary reductions as a result. Unless and until a judge is convicted and removed, however, such reductions in compensation run afoul of the Constitution.

For seven years, officials in all three branches of government have taken actions that have diminished Judge Hastings's compensation in office and that have imposed annual liabilities far in excess of that compensation.[48] If the principles of double jeopardy, speedy trial, and fundamental fairness do not preclude a second trial of an accused judge, then surely principles of decency and fairness, as well as those embodied in the Compensation Clause, require that funds be provided for *and* during the course of the defense of an acquitted judge who is called upon to defend himself at a second trial.

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[47] Duplantier v. United States, 606 F.2d 654, 669 (5th Cir.) reh'g denied, 608 F.2d 1373 (1979), cert denied, 449 U.S. 1076 (1981) (quoting Atkins v. United States, 556 F.2d 1028, 1045 (Ct.Cl. 1977), cert denied, 434 U.S. 1009 (1978)).

[48] Cf. Note, Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 94 Yale L.J. 1117, 1142 (1985) (noting costly expenses of federal judge in defending against ultimately dismissed complaint).

In addition, the Senate adopted, and the district court abided, the view that this impeachment trial is a *remedial* proceeding to determine *whether* Judge Hastings's rights as an article III judge *should* be terminated. One of the rights of an article III judge is to insist that his compensation not be diminished *during* his continuance in office by the executive or legislative branches of government. Under the district court's own reasoning then there is no justification for the past, present and continuing reduction of the judge's compensation *during* his continuance in office.

Of course, the identical conclusion obtains when one properly views the underlying proceedings as criminal in nature. No illicit presumptions as to guilt or innocence may properly guide the application of the Compensation Clause. Indeed, when one examines the circumstances surrounding Judge Hastings's defense, the threat to the principle of judicial independence is crystallized. The House managers have available to them the products of the seven years of investigations. They have had and will continue to have a special impeachment trial staff of four lawyers and the services of five other House lawyers, with the appropriate support services. At the outset of its inquiry, the House received a record that had been compiled by the judiciary over a three-and-a-half year period. The judiciary had retained the services of two experienced lawyers, aided by paralegals and support staff, and had enjoyed the services of the FBI in aid of its investigation.

Moreover, over the years, the government has not provided any resources to enable Judge Hastings to conduct investigations or to prepare for or conduct either his first or second defense. As a result, Judge Hastings has not only been affected financially, but substantively. The vast inequities[49] in resources between the this article III judge and his accusers, when viewed in light of the doctrines of separation of powers and judicial independence compel no other conclusion than that for the integrity of the process to be maintained, funds must be provided to Judge Hastings. In response to Judge Hastings's claims, however, the district court, cursorily refers to (1) the lack of statutory provision for attorney's fees, (2) the possibility of reimbursement if acquitted, and (3) the procedure employed in prior impeachments, and abruptly concluded that "[t]he situation presented does not violate Article III, Section I."[50] The district court's conclusion -- seemingly informed by a prejudgment of the underlying articles against Judge Hastings[51] -- represents a misunderstanding of the framers's intent in guaranteeing to Article III judges undiminishable compensation.

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[49] The inequities are so overwhelming that they are practically immeasurable. For example, the available figures establish that the amounts expended by the judiciary and the House for special counsel and staff and other costs of investigations exceeded $2,000,000.00, even before the articles were exhibited.

[50] Hastings v. United States Senate, et al., No. 89-1602-GAG, supra at 9.

[51] Without identifying the specific arguments to which it refers, the district court maintains that arguments made by Judge Hastings with respect to the independence of the judiciary were "ill-advised." Hastings v. United States Senate, et al., No. 89-

In his concurrence in Hastings v. Judicial Conference of the United States, supra, Judge Harry Edwards of this Court recognized the dangers posed to an independent judiciary by the incidental diminution of a judge's salary in defending against complaints made pursuant to the 1980 Act. Disavowing undue concern for the "corrupt judge who is annoyed by his or her colleagues' demonstrations of disapproval," Judge Edwards enunciated the potential for abuse in the provisions of the 1980 Act: "that they might be misused to pressure or intimidate the nonconformist, the judge whose judicial style or legal philosophy are repugnant to the majority of his or her colleagues."[52] The determination whether Judge Hastings's impeachment constitutes an abuse or effective administration of the Act was not the issue before the district court. Rather, the question presented considered whether the guarantee that judges remain secure in their compensation extends to impeachment proceedings, and operates as a constitutional safeguard against political abuses by Congress. Judge Hastings maintains that the history of the Constitution and the framers's intent render constitutionally impermissible the diminution of his salary in defense of this impeachment. Indeed,

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1602-GAG, supra at 11. Blinded by the subjective view that "misconduct" has occurred, the district court fails to address the constitutional issues by fundamentally misreading Judge Hastings's claims as seeking "a preference not mentioned in the Constitution." Id.

[52] 770 F.2d at 1107.

when one seriously analyzes the constitutional plan envisioned by the framers it becomes clear that the provision of funds to accused judges would serve the dual goals of preserving the independence of the judiciary and assuring the responsible and expeditious resolution of charges against them by the Congress. Conversely, without such provision, as Judge Edwards's concurrence projects, the potential for abuse may be great.[53]

Judge Hastings's Compensation Clause claim, like all others, does not solely concern Alcee L. Hastings the man or even the individual jurist. Rather, it concerns a constitutional plan, a national framework for the proper allocation and definition of responsibilities. Judge Hastings's seven year ordeal has resulted from a "'plan fashioned by the political branches . . .ineluctably operating to punish . . . judges qua judges."[54] As such, the prohibition contained in the Compensation Clause against the diminution of judicial salary during continuance in office applies to Judge Hastings's claim and mandates reimbursement for his defense of the charges against him. The district court's ruling to the contrary is erroneous and cannot be sustained.

C. Basic Concepts of Double Jeopardy Bar the Trial of Appellant on the first fifteen Articles of Impeachment.

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[53] For example, here notwithstanding the indictment by the Executive and the arguments made by prosecutors in the subsequent federal trial, the House made no inquiry as to whether impeachment was appropriate until the 1980 Act had run its course. Whatever the outcome of the underlying impeachment proceedings -- the result of which will rest upon purely circumstantial evidence -- Judge Hastings has suffered an unconstitutional and substantial diminution in his salary during continuance in office.

[54] 606 F.2d at 669 (quoting Atkins, 556 F.2d at 1054).

The Senate seeks to retry and readjudicate accusations against Judge Hastings on which a jury acquitted him six years ago. Holding, in effect, that the purposes and functions of the the Senate and the federal district court before which Judge Hastings's was acquitted are significantly different, the district court permitted the trial of Judge Hastings to go forward. Specifically, the district court held that impeachment proceedings are not criminal, but rather sui generis. The Constitution, however, expressly classifies cases of impeachment as criminal in nature.

The standard for impeachment is the English criminal standard: "The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const., Art. II, § 4 (Emphasis added). The need to create exceptions in cases of impeachment to rights accorded the accused in ordinary criminal cases was recognized and made explicit: "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury." U.S. Const., Art. III, § 2, cl. 3 (Emphasis added). "The President . . . shall have the Power to grant Reprieves and Pardons for all Offenses against the United States, except in Cases of Impeachment." U.S. Const., Art. II, § 2, cl. 1 (Emphasis added). The general applicability of the double jeopardy prohibition was also recognized by the framers, and one and only one exception was made -- one for parties convicted. See U.S. Const., Art. I, § 3, cl. 7. The Constitution did not and does not include any exception to the general principle for a *party acquitted*.

The intent evidenced by the language of the Constitution is confirmed by three undisputed historical facts. Cases of impeachment originated as and remained criminal cases in England. The framers were aware of the nature and essential characteristics of cases of impeachment in England and in the thirteen states when they drafted our Constitution. They intended that the nature and characteristics of cases of impeachment be the same under our Constitution, with specific changes adopted to limit the jurisdiction and powers of the House and Senate in order to eliminate abuses that had occurred in English impeachment cases.[55]

Three aspects of that history bear on the issues raised by Judge Hastings's challenge. First, the framers, rejected proposals that the powers of impeachment extend to non-criminal charges, such as those alleging "malpractice or neglect of duty." They also rejected the suggestion that "maladministrations" be added to the standard for impeachment. Instead, the standard adopted was the criminal standard, exactly as it had been established in England: "Treason, Bribery, and other high Crimes and Misdemeanors." Still, the framers realized that the English impeachment standard embraced political offenses against the state, offenses that were not recognized as crimes at common law, and that Congress might also confront such abuses that should be recognized in cases of impeachment even though they might not also constitute statutory crimes subject to prosecution in the courts.[56]

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[55] *See*, *e.g.*, Hamilton, *The Federalist No. 65* at 440-41 (Hamilton) (Cooke ed. 1961) (model borrowed from Great Britain and State constitutions that followed the example); *id*. *No. 84* at 576 (identifying limit on Senate's power to impose punishment as a protection for the accused). *See also* *The Constitution of the nited States: Analysis and Interpretation*, S. Doc. 82, 92d ong., 2d Sess. 572-78 (1973) (summary of history and nterpretation) [hereinafter "*Constitution: Analysis*"].

Although the framers recognized the need to preserve the flexibility established by English practice, they also sought to eliminate two abuses that had marked English practice. First, persons other than officeholders could be and had been impeached by the House of Commons and tried and convicted by the House of Lords. More important, the House of Lords had exercised the power to impose the full range of penal sanctions, including the death penalty, upon persons convicted in impeachment trials for conduct that would not have constituted crimes under established common law principles.[57] Accordingly, the framers sought to minimize the potential for abuse in three ways. They limited the class of persons subject to impeachment to officers of the United States; they provided that ". . . no Person shall be convicted without the Concurrence of two thirds of the Members present," and, they limited the punishment the Senate might impose to ". . . removal from Office, and disqualification to hold and enjoy Office of honor, Trust or Profit under the United States. . ."

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[56] The practice of the Senate has placed this issue beyond serious dispute. See, e.g., Impeachment Inquiry Staff, "Constitutional Grounds for Presidential Impeachment," in High Crimes and Misdemeanors: Selected Material on Impeachment, 1-26 (1973).

[57] See, e.g., R. Berger, Impeachment: The Constitutional Problems 54-55 (Harvard 1973); P.C. Hoffer and N.E.H. Hull, Impeachment in America, 1635-1895 3-8 (Yale 1984) (summaries of English practice on point).

The apparent meaning established by the language and history of these provisions is reinforced by the explanations Hamilton provided in The Federalist. Hamilton devoted The Federalist No. 65 to explaining and defending the framers' decision that "the sole power to try all Impeachments" should be assigned to the Senate. Confronting arguments that the selection of the legislative branch to sit as a court of impeachment was inconsistent with the separation of powers model and that the power should have been allocated to the Supreme Court, Hamilton argued that the political nature of the offense, the passions that would be aroused, and the potential consequences to the accused were such that a body more numerous and secure in the face of public clamor and political pressure was necessary. No. 65 at 441-42.

Hamilton also argued -- drawing directly upon the express exception to the protection against double jeopardy for a "party convicted" -- that because a party convicted and punished in one forum might be subject to a second trial and further punishment, the proceedings had to be conducted in separate branches. Hamilton asked:

> Would it be proper that the persons, who had disposed of his fame and his most valuable rights as a citizen in one trial, should in another trial, for the same offence, be also the disposers of his life and his fortune?

and concluded that

> by making the same persons Judges in both cases, those who might happen to be the objects of prosecution would in great measure be deprived of the double security, intended them by a double trial. The loss of life and estate would often be virtually included in a sentence, which, in its terms, imported nothing more than dismission from a present, and disqualification for a future office. . . .[58]

Hamilton again refers to the limitations on the Senate's power in cases of impeachment in his response to those who decried the absence of a bill of rights in the Constitution.[59] In context, his reference makes clear that the limitation on the punishment the Senate might impose was necessary to prevent those charged with non-statutory political offenses from suffering excessive punishment based upon ex post facto definitions creating offenses against the state. That reference provides further evidence that it was this limitation that provided the sole justification for a limited exception to the bar of double jeopardy -- an exception for a party convicted by the Senate of an offense that was also punishable as a statutory crime. The limitation on the Senate's power to impose penal sanctions did not, however, create any need or justification for a comparable exception for a party acquitted, and none was made in the Constitution.[60]

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[58] Id. at 442.

[59] See The Federalist No. 84 at 575-77.

[60] In the First Congress, Madison confirmed the framers understanding that, absent an express exception, the protections against double jeopardy would apply in cases of impeachment. Under the language he proposed for a bill of rights, "Cases of

The historical evidence, the select express language, the contemporary arguments advanced by the framers, and the actions of the first Congress, see note 63, are consistent, and collectively establish three propositions: Cases of impeachment were understood and intended to be criminal in nature. The framers intended that protection against double jeopardy would apply, absent express exceptions. And, the one and only express exception agreed upon by the framers is that for parties convicted. These propositions alone make clear that the bar of double jeopardy must be recognized where the House seeks to prosecute a party acquitted on accusations rejected by a jury.

Since the framing of the Constitution, the United States Supreme Court has regularly been called upon to determine whether particular proceedings are criminal in nature thus invoking the protection against double jeopardy. The Court has recognized the

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Impeachment" would have been excepted entirely from the established protections against double jeopardy: "No person shall be subject, except in Cases of Impeachment, to more than one punishment or one trial for the same offense." 1 Annals of Congress 432 (June 8, 1789), reprinted in B. Schwartz, The Bill of Rights: A Documentary History ["Documentary History"] at 1027. The House adopted Madison's proposed language. See House of Representatives Journal, September 1789, reprinted in Documentary History at 1122-75. The language adopted by the Senate, however, excluded the general exception. Senate Journal, August-September 1789, reprinted in Documentary History at 1147-54. The language proposed by the Senate became that of the Bill of Rights: ". . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const., amend. V. Under the Constitution, of course, the protection extends to all offenses that place an accused "in peril of legal penalties upon the same accusation" as it had under common law; not just to those that exposed the accused to loss of life or limb. Ex Parte Lange, 85 U.S. (18 Wall.) 163, 172-72 (1873).

protection against double jeopardy as one of those guarantees that is so "fundamental to the American scheme of justice" that it is among one of the core protections embodied in the Due Process Clauses of the Fifth and Fourteenth Amendments.[61] The tests established by Supreme Court jurisprudence on the guarantee against double jeopardy further confirm that, consistent with "the American scheme of justice," cases of impeachment must be viewed as criminal in nature.

The first and ordinarily dispositive test is whether those who "established the penalizing mechanism . . . indicated either expressly or impliedly a preference for one label [criminal or civil] or the other."[62] As noted above, the Constitution -- patterned after the English standard -- both expressly and impliedly labels cases of impeachment as criminal. No implication to the contrary can be fairly inferred from the words chosen, the history considered, or the intent expressed by the framers. Accordingly, under the first test, double jeopardy must apply in cases of impeachment. Moreover, as substantiated by an analysis of the function of impeachment and the policies underlying the protection against a second trial, double jeopardy should apply in cases of impeachment.

The Supreme Court has recently recognized that "in determining whether a particular civil sanction constitutes criminal punishment, it is the purpose actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated." United States v. Halper, ____ U.S.____, 109 S.Ct. 1892 (1989). The sanction authorized by the Constitution in cases of impeachment is not merely remedial, it is also penal. The Senate does not remove; it convicts (or acquits). Removal is merely established as the minimum consequence that follows from a conviction. But the Senate has power to punish further: It may sentence the convicted accused to a permanent "disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States," for which no Presidential pardon or reprieve exists.

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[61] Benton v. Maryland, 392 U.S. 784, 794-95 (1969); cf. Constitution: Analysis at 1094.

[62] United States v. Ward, 448 U.S. 242, 248 (1984).

Halper also establishes that where the purposes underlying the sanction itself are punitive double jeopardy considerations are implicated, notwithstanding the characterization of the proceeding.[63] Most important, however, Halper makes clear that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment . . . ."

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[63] In Halper, the Court recognized that "[t]he notion of punishment . . . cuts across the division between the civil and the criminal law." 109 S.Ct. at _____. Thus, impeachment proceedings, however characterized, like "civil proceedings may advance punitive as well as remedial goals." Id. See also Hicks v. Feiok, 485 U.S. ____, ____ (1988) ("the labels affixed either to the proceeding or to the relief imposed . . . are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law").

109 S.Ct. at _____ (emphasis added).[64]

The sanctions authorized in impeachment proceedings are hardly designed "solely to serve a remedial purpose." Permanent disqualification "involves an affirmative disability and restraint" of the type that "has historically been viewed as punishment."[65] Whatever the full scope of disqualification, no alternative purpose other than punishment that "may rationally be assigned to it." [66]

The core policy underlying double jeopardy --

> one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.
>
> In accordance with this philosophy it has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and . . . "is a bar to a subsequent prosecution for the same offence," . . . even though an acquittal may appear to be erroneous. . . .[67]

All three branches of the federal government have used the resources and powers of the State to attempt to convict Judge Hastings for the offenses articulated in the first fifteen

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[64] Retribution and deterrence have long been identified as the "traditional aims of punishment." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).

[65] Kennedy, 372 U.S. at 168.

[66] Id. at 169.

[67] Green v. United States, 355 U.S. 184, 187-88 (1957) (citations omitted).

Articles of Impeachment against him of which he has already been acquitted. For seven years, they have subjected the judge, individually and as an officeholder, to embarrassment, expense, and ordeal, and have compelled him to live in a continuing state of anxiety and insecurity. They have sought to enhance the possibility he might be convicted by utilizing information produced in his defense at trial to develop further evidence against him. They have enhanced the possibility of an erroneous conviction by accumulating evidence that supports their accusations and seeking to present it seven years after the fact. Policy and jurisprudential declarations, together with the express language and intent of the Constitution, establish that the bar of double jeopardy does and should preclude the burden of a second trial upon Judge Hastings who has already been acquitted by a jury of the primary offenses now alleged.

D. The Failure of the House of Representatives to Adopt Articles of Impeachment Within Five Years of the 1983 Jury Verdict Bars Trial on Articles I-IV.

Although the district court failed specifically to address Judge Hastings's claim of unconstitutional delay, it is clear that concerns of justiciability underlay the court's rejection of that claim. Those concerns are misplaced. Judge Hastings's due process challenge is one traditionally committed to the courts to resolve.

At a minimum, an accused in an impeachment proceeding must be entitled to those rights deemed so basic to the American system of justice and so essential to fundamental fairness that they are encompassed by the Due Process clauses of the Fifth and Fourteenth Amendments. The severity of the sanction that may be imposed in impeachment proceedings justifies and indeed compels application of the most exacting protections. The fact that the rights at stake are constitutional in source and were guaranteed to achieve the fundamental public interest in maintaining the independence of the federal courts should foreclose any debate on the application of such protections.

Here, the government filed the indictment that publicly accused Judge Hastings of having been a participant in Borders's corrupt scheme in December 1981. More than six-and-a-half years elapsed between the filing of the indictment that made that accusation and the exhibition of the Articles of Impeachment that reallege that accusation in this case. The prosecutors publicly accused Judge Hastings of having presented false testimony and fabricated evidence at the trial that ended in early February 1983. More than five years elapsed between the making of those accusations and the exhibition of the articles that reallege those accusations in this case. All evidence necessary to determine whether further inquiry or action were appropriate was available to the public and the House shortly after the jury returned its verdict. Borders had been tried and convicted, and his conviction had been affirmed by December 1982. The testimony in that case had been transcribed, and the record was complete. The testimony at Judge Hastings's trial was also transcribed and the record there was also complete.

The long interval enjoyed by the House and suffered by Judge Hastings, increased the advantages of the prosecutors and prejudiced the judge's right to fairly confront the accusations beyond repair. Basic concepts of due process demand timely presentation of accusations to protect the accused's right to adequately respond. Instead, the Articles of Impeachment against Judge Hastings are the product of one-sided investigations. To the Judge's detriment, relevant records have now been destroyed; crucial witnesses have died or become mentally impaired, including two who appeared at the Judge's trial in 1983; and, most important, the recollection of every witness has necessarily dimmed, and, for many, their testimony has been so often taken that it must be impossible now to determine whether further testimony would evidence recalled knowledge of the underlying events or merely recalled testimony or statements given on prior occasions. Finally, the central accusation against Judge Hastings concerns events that occurred in 1981, more than seven years ago.

One requirement of due process prohibits the government from bringing charges that accuse a citizen of high crimes or misdemeanors after inordinate delay. Standing alone, due process may require dismissal of stale charges if the accused can demonstrate actual prejudice to his ability to defend against the charges as a result of the delay, and the government fails to justify the delays, even where prosecution is not otherwise barred by the prescribed statute of limitations.[68] The Supreme Court has made clear, however, that federal statutes of limitations establish an irrebuttable presumption of improper prejudice.[69]

Congress has indicated that the irrebuttable presumption of prejudice arises, if offenses of the kind charged in the first fifteen articles are not filed within five years of their occurrence.[70] In one view, cases of impeachment are truly criminal, and the statutory limitation should applies. Under a broader view of the nature of the however, the statutes of limitations may be viewed as declarations of policy creating a presumption that should be applied to give content to the constitutional requirements mandated by fundamental fairness and due process principles.

Dismissal of these articles of impeachment is required under either standard. The delay here implicates the precise concerns that have guided Congress in implementing the requirement of prompt indictment and trial through the prescription embodied in statutes of limitation and repose:

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[68] See, e.g., United States v. Marion, 404 U.S. 307, 324 (1977) (principle recognized); United States v. Lovasco, 431 U.S. 783, 789-90 (1976) (reaffirming principle and indicating the test is whether compelling respondent to stand trial after governmental delay would violate fundamental conceptions of justice which define "the community's sense of fair play and decency.").

[69] United States v. Marion, 404 U.S. 307, 327 (1977) (statutes establish an "irrebuttable presumption that a defendant's right to a fair trial would be prejudiced"); Toussie v. United States, 397 U.S. 112, 114-15 (1970) (statutes to be construed in favor of repose to implement constitutional purposes); United States v. Ewell, 386 U.S. 116, 120-22 (1966) (statutes of limitation establishes primary means implementing constitutional protection against overly stale charges).

[70] See 18 U.S.C. § 3282 (establishing general bar to prosecution of federal offenses, unless indictment is returned within five years).

> The purpose of a statute of limitation is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.[71]

Moreover, here, the delay here has caused actual, apparent and substantial prejudice to Judge Hastings. In contrast, the only substantive justification proffered for the delay is the time consumed by the judiciary in the proceedings it conducted under the 1980 Act. The judiciary was not considering new accusations. They were seeking additional evidence to support accusations that had been publicly made and rejected by a jury. These reasons are untenable. Congress cannot have intended that the House sit on its hands while the judiciary conducted a four-year investigation to determine whether the circumstantial evidence supporting criminal accusations against an acquitted judge could be expanded and remarshalled to support a claim that the jury was wrong.

It is here that the House's view of the proper separation of powers precludes acceptance of the arguments it makes. Congress declined to delegate the sole power of impeachment when it adopted the 1980 Act. The House retained the sole power and the sole responsibility for its exercise. It cannot claim that sole power and simultaneously claim that delays occasioned by proceedings in another branch relieved it of responsibility for the exercise of that power in this case. The House in effect deferred to the judiciary to await an advisory opinion on whether it should exercise its sole power of impeachment here. Such a deferral may be politically attractive; it is, however, constitutionally impermissible, at least when it results in a delay of the magnitude visited upon Judge Hastings. It is at this point that the requirement of fundamental fairness combines with those necessary to maintain the proper separation of powers to compel the conclusion that those articles must be dismissed.

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[71] Toussie, 397 U.S. at 114-15 (quoted with approval in Marion, 404 U.S. at 324).

VI. CONCLUSION

For the reasons set forth above, Appellant respectfully requests that this Court reverse the judgment of the United States District Court for the District of Columbia and declare (1) that the Impeachment Trial Committee established pursuant to Senate Resolution 38 and Rule XI of the Senate Impeachment Rules violate the Constitution; (2) that the denial of funds to Judge Hastings violates the Compensation Clause; (3) that the trial of Judge Hastings on the first fifteen articles of impeachment is barred by principles of double jeopardy and due process; and (4) that the delay in the presentment of the first fifteen Articles of Impeachment by the House require that those articles be dismissed.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5191

WALTER L. NIXON, JR.,

Appellant,

v.

THE UNITED STATES SENATE
The IMPEACHMENT TRIAL COMMITTEE,
Established Pursuant to
Senate Resolution 38,
The Honorable WALTER J. STEWART
Secretary of the Senate, and
The Honorable JOSEPH E. JENIFER
As Acting Public Printer
for the United States

Appellees.

On Appeal From A Final Decision Of The
United States District Court For The
District of Columbia

BRIEF OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The following parties have participated in this action:

Appellant in No. 89-5191 -- Walter L. Nixon, Jr.

Appellant in No. 89-5188 -- Alcee L. Hastings

Appellees in both cases -- United States Senate
Rule XI Committee in
Hastings impeachment
Walter Stewart,
Secretary of Senate
Joseph Jenifer
Acting Public Printer

The ruling under review is the decision of the District Court (Gesell, J.) dated July 5, 1989, which is reproduced at Appendix 3 of this Brief.

There is no related case pending in any other court concerning these parties.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, as it is a final order of the United States District Court for the District of Columbia.

QUESTIONS PRESENTED

1. Whether the District Court erred in ruling that this challenge to the constitutionality of Senate Impeachment Rule XI constitutes a non-justiciable political question.

2. Whether the use of a committee of twelve senators to hear all witnesses and receive all evidence violates the Senate's duty under Article I, § 3, cl. 6 of the Constitution to "try all Impeachments."

STATEMENT OF THE CASE

Walter L. Nixon, Jr. faces an impeachment trial before a committee of twelve senators beginning September 6, 1989. President Johnson appointed Nixon to the federal bench in 1968. In 1982, Nixon became Chief Judge of the Southern District of Mississippi. This appeal presents his constitutional challenge to the use of a committee to conduct the impeachment trial.

1. The Adoption Of Senate Impeachment Rule XI: 1936

Until 1986, the Senate conducted all impeachment trials on the Senate floor in the full view of all Senators. The Senate adopted the current version of Impeachment Rule XI in 1936, while impeachment articles were pending against District Judge Halsted Ritter of Florida. After the Senate approved the rule, its sponsor, Sen. Ashurst, admitted in floor debate, "A considerable division of opinion exists as to whether the Senate possesses the power to have the testimony in impeachment trials taken by committee." 80 Cong. Rec. 3424 (March 9, 1936). Sen. Ashurst explained that a recent impeachment trial (of District Judge Harold Louderback of New York) had been "dreary, involved, and protracted." Id. at 3425. A number of senators, according to Sen. Ashurst, urged the Judiciary Committee to find some less onerous method for trying impeachments, and the amended Rule XI was the result. Id.

Sen. Austin of Vermont urged the Senate not to deny Judge Ritter a trial before the full Senate "because I believe there is so much doubt about the constitutionality of the resolution." Id. at 3425. Sen. Austin added (id.):

> I am persuaded, after some study, that the Senate cannot by resolution do away with the right of the individual who becomes a respondent in an impeachment proceeding. The Senate might constitutionally waive its rights, but when it undertakes to waive or do away with the rights of a respondent under the law to have that tribunal which is established by the Constitution as the sole tribunal to pass upon the issues upon which hang his honor and his official right, we cannot do it as a matter of practicality, for, as I see it, any respondent charged here with high crimes and misdemeanors, or other cause for impeachment, would be entitled, without question, to come into this distinguished court and offer all the same witnesses who had been examined outside the presence of the court.

In response to Sen. Austin's remarks, Sen. Ashurst described Rule XI as a consent-based procedure, clearly indicating that a committee would not conduct the trial unless the accused agreed to that procedure. Sen. Ashurst stated that the committee arrangement might "simplify the work" of an impeachment trial, but only "if and when the respondent was willing thus to have the testimony taken by a committee and the managers also were thus willing." Id. at 3426 (emphasis added). Perhaps because of this limitation on Rule XI, the Senate conducted Judge Ritter's trial on the floor of the Senate, like all previous impeachment trials.

Senate Impeachment Rule XI provides in relevant part (emphasis added) [See Appendix 1]:

> In the trial of any impeachment the Presiding Officer of the Senate, upon the order of the Senate, shall appoint a committee of twelve Senators to receive evidence and take testimony at such times and places as the committee may determine . . . and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.
>
> Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to

> determine competency, relevancy and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

2. The Use Of Rule XI: 1986 and 1989

In 1986, the House adopted Articles of Impeachment concerning District Judge Harry Claiborne of Nevada. Despite Sen. Ashurst's statements that trial by Rule XI committee would occur only when the respondent consented, the Senate denied Claiborne a trial before the full Senate and conducted the trial before a Rule XI committee.

After trial before the Rule XI committee, Claiborne made a last-second appeal to this Court raising several issues, including his right to trial before the full Senate. Claiborne v. United States Senate, No. 86-2780 (D.D.C. Oct. 8, 1986). At a hearing on the evening before the Senate began deliberations on Claiborne's impeachment, Judge Harold Greene expressed misgivings about the Rule XI procedure (Id. at 190):

> It is unfortunate in a way that evidence on impeachment was taken through a committee for the first time, apparently, in the history of the Republic. It is true that the Senate and the House are bodies with very important business, and they must make allowances for that in some way, just as the general work of Congress is more and more done by committees and by staff members. But we cannot forget

> that this is a shortcut which has been used for the first time in this proceeding involving Judge Claiborne.[1]

After serving on the Rule XI Committee in *Claiborne*, Senator Heflin also shared Judge Greene's concerns about the Rule XI procedure: "It seems apparent that the Framers of the Constitution intended that the Senate conduct a full judicial trial on the Senate floor." Heflin, "The Impeachment Process: Modernizing an Archaic System," 71 *Judicature* 123, 123 (Aug.-Sept. 1987).[2] Nevertheless, when the Senate received impeachment articles concerning Judge Hastings in 1988, the Senate again appointed a Rule XI committee to receive all evidence, and that committee began hearings on July 10, 1989. *See* S. Res. 38, 101st Cong., 1st Sess., 135 Cong. Rec. S2803 (daily ed. Mar. 16, 1989).

3. *Senate Proceedings Concerning Nixon*

On May 11, 1989, the House of Representatives adopted three Articles of Impeachment against Nixon. The House based the Articles of Impeachment upon Nixon's conviction in 1986 on two counts of making false statements to a grand jury. Nixon continues to assert his innocence of those charges, an assertion bolstered by the recantation by a key trial witness, Wiley Fairchild, in August 1988. Fairchild, a Mississippi businessman whose trial testimony was most damaging, has stated that he lied at trial in order to curry favor with the prosecutor. Judge Nixon's motion for a new trial is pending before the Fifth Circuit based on this evidence and on prosecutorial misconduct throughout the investigation and trial. No. 89-4127 (5th Cir., argued June 5, 1989).

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[1] Despite these misgivings, Judge Greene held that the Speech or Debate Clause barred Claiborne's lawsuit. Since Claiborne did not name any congressional employees as defendants, however, that Speech or Debate Clause ruling could not apply to this case. *See* pp. 24-27, *supra*.

[2] Sen. Heflin has proposed a constitutional amendment to change the impeachment process. S.J. Res. 113, 100th Cong., 1st Sess., 133 Cong. Rec. S4991 (daily ed. April 9, 1987).

When the House of Representatives exhibited the Articles of Impeachment in the Senate on May 16, 1989, the Senate adopted Resolution 128. See Appendix 2. Pursuant to Senate Impeachment Rule XI, Resolution 128:

(a) Appointed a committee of twelve senators "to receive and to report evidence with respect to articles of impeachment against Judge Walter L. Nixon, Jr." The Senate authorized the committee to submit a "certified copy of the transcript of the proceedings and testimony had and given before it," and also to "report to the Senate a statement of facts . . . and a summary . . . of evidence that the parties have introduced on the contested issues of fact."

(b) Authorized the disbursement by defendant Stewart from the contingent fund of the Senate of all funds necessary for the business of the committee.

(c) Authorized the printing by defendant Jenifer of all testimony, reports or other materials generated by the committee.

The Nixon impeachment committee will conduct the impeachment trial beginning September 6, 1989.

4. The Proceedings In The District Court

On June 1, 1989, Judge Alcee L. Hastings of the Southern District of Florida filed an action in the United States District Court for the District of Columbia raising eleven challenges to the constitutionality of the pending impeachment proceedings against him. Judge Hastings' claims included the assertion that double jeopardy bars his impeachment and that he has a constitutional right to payment of his legal expenses. The named defendants included Walter Stewart, Secretary of the Senate, and Joseph Jenifer, the Acting Public Printer.

Nixon moved to intervene in that lawsuit on June 14, 1989, filing a Complaint against the same defendants that raised a single issue: whether trial by an impeachment committee violates Article I, section 3, clause 6 of the Constitution, which grants the Senate the "sole Power to try all Impeachments." Nixon requested declaratory relief under 28 U.S.C. §§ 2201 and 2202. The District Court granted Nixon's motion to intervene.

Following briefing by the parties, the case was argued on June 29, 1989, on the defendants' motion to dismiss and on Judge Hastings' and Nixon's motions for preliminary injunction.

Because the parties raised no factual issues, Nixon also asked the Court to consolidate the preliminary injunction with final judgment, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure.

On July 5, 1989, the District Court issued an Order granting the defendants' Motion to Dismiss and denying injunctive relief. The accompanying opinion explained that the Court had consolidated the preliminary injunction proceeding with a hearing on the merits under Rule 65(a)(2). Slip op., at 2. The District Court ruled that the case presented nonjusticiable political questions and also might be shielded from judicial review by the Speech or Debate Clause of the Constitution. Id. at 6-7, 10. The District Court also held that the use of a committee to conduct the impeachment trial does not violate the Constitution. Id. at 5.

5. Appellate Proceedings

Judge Hastings' impeachment trial began on July 10, 1986, five days after the District Court's ruling. On July 7, Judge Hastings asked this Court for an injunction pending appeal or, in the alternative, for final judgment without briefing or argument. On the morning of July 10, this Court entered a *per curiam* order denying the requested relief on the grounds that appellant "has not demonstrated the requisite likelihood of success on the merits to warrant either injunctive relief pending appeal or expedition." The Supreme Court denied Judge Hastings' emergency motion for a stay.

Nixon filed a Notice of Appeal on July 10, 1989, along with an Emergency Motion requesting acceleration of briefing and argument. That motion was denied by per curiam order on July 12, 1989.

SUMMARY OF ARGUMENT

Judge Nixon has a constitutional right to a trial before the Senate. By relegating the impeachment trial to a committee of twelve senators, appellees have violated the constitutional mandate that the Senate "try all Impeachments."

1. This Court's obligation to decide Nixon's constitutional claim is plain. This action does not present a non-justiciable political question, but rather a straightforward question of constitutional law that should be decdied by the courts, consistent with Baker v. Carr, 369 U.S. 186 (1962), and the Supreme Court's later decisions on the political question doctrine. Indeed, the District Court failed even to consider Powell v. McCormack, 395 U.S. 486 (1969), which plainly establishes that this case is justiciable. The Senate has exceeded its constitutional authority by using a committee to conduct the impeachment trial. It is the duty of this Court "to say what the law is" and not blindly defer to the Senate's interpretation of Article I, § 3, cl. 6.

2. Nor does the Speech or Debate Clause of the Constitution bar this action. Nixon's claim does not conflict with the purpose of that clause since it presents no threat to legislative independence, but rather seeks to vindicate his

individual right to a trial by the full Senate. In addition, the individual congressional employees enjoy no protection from this action under the Speech or Debate Clause. Their ministerial acts are fully subject to judicial review.

3. The Constitution requires the full Senate to conduct all aspects of an impeachment trial. The textual requirement that the Senate shall "try all Impeachments" precludes the Senate from shunting to a committee of twelve senators the actual receiving of evidence. The procedural shortcut embraced by Rule XI disregards the Framers' expressed intention that a "numerous" court conduct the impeachment trial.

Judge Nixon cannot receive a fair impeachment trial when seven-eighths of the jurors do not hear evidence. Each senator must have the opportunity to observe the demeanor of the witnesses and reach his own conclusion on credibility, not simply defer to his colleagues on the Rule XI committee. This concern is particularly important here because the allegations against Judge Nixon turn in large measure on the credibility of witnesses. One key witness, for example, has recanted critical parts of his trial testimony.

The impeachment trial of a life-tenured federal judge is not a routine matter that the Senate can relegate to a committee. This Court must prevent the final stage of the impeachment process from falling victim to the Senate's misinterpretation of its constitutional duty to conduct the trial before the full Senate.

ARGUMENT

I.

THERE IS NO JURISDICTIONAL OR PRUDENTIAL BAR TO JUDICIAL REVIEW HERE

Announcing its conclusion that this case is nonjusticiable, the District Court wrote: "[i]t is crystal clear that impeachment proceedings are wholly committed to Congress under the Constitution. Thus a classic political question is presented under Baker v. Carr, 369 U.S. 186, 217 (1962)." Slip op. at 11. But the District Court's conclusion is supported by neither Baker v. Carr nor later Supreme Court applications of the political question doctrine. The District Court also suggested that the Speech or Debate Clause might bar this action, although the District Court completely ignored Powell v. McCormack, 395 U.S. 486 (1969), which clearly establishes that the courts can and should decide this case.

After first reviewing the courts' subject-matter jurisdiction over this case, we will explain why Nixon's claim is entirely justiciable, and why the Speech or Debate Clause does not bar this action.

A. Subject-Matter Jurisdiction Is Present

Under Baker v. Carr, 369 U.S. 186 (1962), this Court should consider three factors in determining whether it has subject-matter jurisdiction: (i) whether the claim "arises under" the Constitution, laws, or treaties of the United

States; (ii) whether the claim presents a case or controversy under Article III; and (iii) whether the claim falls within any statutory grant of jurisdiction to this Court. Id. at 198-204. Nixon's claim satisfies all of these standards.

1. Nixon's Claim "Arises Under" the Constitution -- A suit arises under the Constitution if the claim "will be sustained if the Constitution . . . [is] given one construction and will be defeated if [it is] given another." Bell v. Hood, 327 U.S. 678, 685 (1946), quoted in, Powell, 395 U.S. at 514. Nixon asserts that a Rule XI committee violates the direction in Article I, § 3, cl. 6 that the "Senate shall have the sole Power to try all Impeachments." This claim clearly turns on the construction of the Constitution: whether the Senate's power to "try" the impeachment means that the Senate itself must conduct the trial.

Powell strongly reinforces this conclusion. The congressional defendants tried to bar judicial review of the House's exclusion of Rep. Powell from the Congress. Those congressional defendants compared the House's power to exclude members (Art. I, § 5) with the Senate's "sole Power" to "try" impeachments (Art. I, § 3, cl.6), and insisted that the courts lack subject-matter jurisdiction to decide cases involving either power. The Supreme Court's flat rejection of that contention clearly indicates that subject matter jurisdiction exists here (395 U.S. at 513-14):

> [The congressional defendants] emphasize that Art. I, § 5 assigns to each House of Congress the power to judge the elections and qualifications of its own members and to punish its members for disorderly behavior. [The congressional defendants] also note that under Art. I, § 3, the Senate has the "sole power" to try all impeachments. [The congressional defendants] argue that these delegations (to "judge," to "punish," and to "try") to the Legislative Branch are explicit grants of "judicial power" to the Congress and constitute specific exceptions to the general mandate of Art. III that the "judicial power" shall be vested in the federal courts. Thus, [the congressional defendants] maintain, the "power conferred on the courts by article III does not authorize this Court to do anything more than declare its lack of jurisdiction to proceed."
>
> We reject this contention. . . .

In many respects the power to exclude congressmen, at issue in Powell, parallels the impeachment power. Both powers are primarily committed to Congress, and both concern barring public officials from performing their duties of trust and responsibility. Powell establishes that the courts have subject matter jurisdiction over claims that Congress failed to discharge its powers in accordance with the requirements stated in the Constitution.

2. Nixon's Claim Presents A Case Or Controversy -- The case or controversy requirement limits the federal courts to questions presented in an adversary context and in a form capable of resolution through the judicial process, while also defining the judiciary's role to assure that it does not

intrude on other branches of government. Flast v. Cohen, 392 U.S. 83, 95, 101 (1968). The dispute here is clearly adversarial. The defendants intend to conduct the impeachment trial before a committee of twelve senators, while Nixon contends that the trial must take place before the full Senate.

The congressional defendants in Powell argued that the claim did not present a "case or controversy" because the Framers would have found it "unthinkable" for courts to review the decision of a legislature to exclude a member. 395 U.S. at 513 n.35. The Court rejected this argument: "[O]ur determination that this cause presents no nonjusticiable 'political question' disposes of respondents' contentions that this cause is not a 'case or controversy.'" Id. This Court reached a similar conclusion in Barnes v. Kline, 759 F.2d 21, 27 (D.C. Cir. 1985) vacated as moot sub. nom. Burke v. Barnes, 479 U.S. 36 (1987) (quoting United States v. ICC, 337 U.S. 426, 430 (1949)): "Courts may not avoid resolving genuine cases or controversies -- those 'of a type which are traditionally justiciable' -- simply because one or both parties are coordinate branches."

3. This Action Is Authorized By Jurisdictional Statute -- A jurisdictional statute, 28 U.S.C. § 1331(a), provides that district courts shall have jurisdiction in "all civil actions wherein the matter in controversy . . . arises under the Constitution," and this provision constitutes a broad

resolution of Nixon's claim turns on construction of the Constitution, his claim falls squarely within § 1331(a).

B. The Political Question Doctrine Does Not Apply Here

Nixon's claim does not present a political question that this Court should find nonjusticiable. Baker v. Carr, 369 U.S. at 217, held that a case presents a political question only if it involves at least one of the following formulations:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

In order to determine whether the constitutional text commits Nixon's claim to the complete discretion of Congress, this Court must interpret the Constitution. Powell, 395 U.S. at 519. The Supreme Court announced this principle in Baker, 369 U.S. at 211:

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a

> **delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.**

Accord, Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1511 (D.C. Cir. 1984) (en banc), rev'd on other grounds, 471 U.S. 1113 (1985), quoted with approval in Antolok v. United States, 873 F.2d 369, 381 (D.C. Cir. 1989) ("The first of these formulations [under Baker] requires the court to determine whether the text of the Constitution implicitly or explicitly commits the stated claim to the political branches. According to the Supreme Court, this necessitates a close textual analysis of specific provisions of the Constitution.").

The District Court's opinion does not reflect a "close textual analysis" of Article I, § 3, cl. 6. To the contrary, the District Court simply deferred to the Senate's interpretation of what type of trial Article I, § 3, cl. 6 requires. Slip op., at 5. The District Court's deferential approach is inconsistent with the judiciary's obligation to interpret the Constitution.

In contrast, in Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975) (three-judge court), Illinois state legislators questioned whether certain legislative action constituted "ratification" of the proposed Equal Rights Amendment under Article V of the Constitution. A three-judge court stated that "[t]he text of the Constitution does not expressly direct Congress, rather than the judiciary, to interpret the word 'ratified' as it is used in Article V." Id. at 1300. The court further held that "[d]ecision of the question presented requires no more than an interpretation of the Constitution. Such a decision falls squarely within the traditional role of the federal judiciary to construe that document." Id. at 1301.

In this case, however, the District Court protested that "[i]t is not this Court's function to tinker with the Senate's procedures or to anticipate problems that could arise." Slip op. at 5. The Dyer Court reached the opposite conclusion: "[T]he question whether the procedure followed by Congress was the one prescribed by the Constitution is a question the Court will answer." 390 F. Supp. at 1301 n.24 (emphasis added).

Many cases present matters with political significance or political content, but still do not trigger the political question doctrine. See, e.g., Davis v. Bandemer, 106 S. Ct. 2797 (1986) (political gerrymandering claim is justiciable); United States v. Nixon, 418 U.S. 683 (1974) (executive privilege claim is justiciable). This Court must follow the Supreme Court's admonition that courts "cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." Baker, 369 U.S. at 217.

In addition, the courts may resolve Judge Nixon's claim without "expressing lack of the respect due coordinate branches of government." Baker, 369 U.S. at 217. Interpretation of the Constitution does not imply lack of respect for a coordinate

Constitution does not imply lack of respect for a coordinate branch of government. Powell, 395 U.S. at 548; see also Goldwater v. Carter, 444 U.S. 996, 1001 (1979) (Powell, J., concurring in the judgment). The possibility that this Court's decision may conflict with the Senate's current course does not preclude judicial review of Nixon's claim. As this Court has stated, "[w]hen a proper dispute arises concerning the respective constitutional functions of the various branches of the government, 'it is emphatically the province and duty of the judicial department to say what the law is.'" Barnes v. Kline, 759 F.2d at 26-27 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

Powell v. McCormack reaffirmed that the need to enforce constitutional limits outweighs the dangers of affronting other branches of government: "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts avoiding their constitutional responsibility." Powell, 395 U.S. at 549.

Then-Justice Rehnquist endorsed this principle in Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474 (1982): "Proper regard for the complex nature of our constitutional structure requires . . . that the Judicial Branch not shrink from a confrontation with the other two coequal branches of the

Federal Government." See The Federalist Papers No. 78, at 506 (A. Hamilton) ("[I]t cannot be the natural presumption [that the] legislative body are themselves the constitutional judges of their own powers . . . It is far more rational to suppose that the courts were designed . . . to keep the [legislature] within the limits assigned to their authority."); Buckley v. Valeo, 424 U.S. 1, 132 (1976) ("Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of the authority does not offend some other constitutional restriction").[3]

The District Court greatly overstated the deference due the Senate's interpretation of Article I, § 3, cl. 6. Hastings, slip op. at 5. Chief Justice Marshall cautioned in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821), that "[q]uestions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty." Similarly, the Supreme Court held in INS v. Chadha, 462 U.S. 919, 943 (1983), that "[r]esolution of litigation challenging the constitutionality of one of the three branches cannot be evaded by courts because the issues have political implication . . ."

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[3] The ruling in Ritter v. United States, 84 Ct. Cl. 293 (1936), cert. denied, 300 U.S. 668 (1937), is not to the contrary. In that case, an impeached judge challenged the Senate's conviction of him as "an unconstitutional exercise of authority." Id. at 295. The Court of Claims ruled that it had no jurisdiction to set aside Ritter's conviction. Unlike Judge Ritter, we seek only to enforce the constitutional limits on impeachment procedure, not to intrude on the substance of the impeachment proceeding.

This point can be illustrated easily. We do not contend that this Court has jurisdiction to review the Senate's finding that an impeachment respondent had committed the offenses with which he was charged. But if the Senate were to adopt a rule permitting conviction in impeachment cases by a bare majority vote (rather than by a two-thirds vote), this Court would surely have jurisdiction over a challenge to that violation of the constitutional text.

Notably, several state courts have decided that, under state constitutional provisions modelled after the federal impeachment provisions, the courts retain the power to ensure that impeachment powers are exercised in accordance with the state constitution. In Mecham v. Gordon, 751 P.2d 957, 962 (Ariz. 1988), the Arizona Supreme Court ruled, "This Court does have power to ensure that the legislature follows the constitutional rules on impeachment." See Kinsella v. Jaekle, 475 A.2d 243, 253 (Conn. 1984), (courts may review impeachment issues "if the legislature's action is clearly outside the confines of its constitutional jurisdiction"); In re Investigation by Dauphin County Grand Jury, September 7, 1938, 2 A.2d 802, 803 (Pa. 1938) (courts have no jurisdiction over impeachments "so long as actions taken are within constitutional lines"). The Florida Supreme Court exercised its power to review the constitutionality of impeachment proceedings when it held that the Florida Senate could not impeach a judge who had previously resigned his office. Smith v. Brantley, 400 So.2d 443 (Fla. 1981).

Two older state court decisions add further support to the position that courts possess the power to review the constitutionality of impeachment proceedings. In Ferguson v. Maddox, 263 S.W. 888 (Tex. 1924), the Texas Supreme Court decided a series of issues raised in connection with the impeachment of the governor. The Texas court aptly stated the standard for judicial review: "The courts, in proper cases, may always inquire whether any department of the government has acted outside of and beyond its constitutional authority. The acts of the Senate, sitting as a court of impeachment, are not exempt from this judicial power, but so long as the Senate acts within its constitutional jurisdiction, its decisions are final." Id. at 893-94. See also People v. Hayes, 143 N.Y.S. 325, 329 (1913) (emphasis added): "[The court] has no jurisdiction to inquire into the sufficiency of charges for which a governor may be impeached, nor, I take it, whether the proceedings looking to that end were properly conducted, unless at their foundation, in their exercise, constitutional guarantees are broken down or limitations ignored."

The claim we present is a straightforward question of constitutional construction. The Senate has violated its constitutional responsibility by establishing a Committee of twelve senators to "try" the case, leaving the other eighty-eight senators merely to vote on it. That course is contrary to the constitutional text, and we must turn to the courts "to say what the law is."

C. The Speech or Debate Clause Does Not Bar Nixon's Claim

Although the District Court did not hold that the Speech or Debate Clause conclusively bars Nixon's claim, it stated the case "raise[s] troubling Speech and Debate clause issues." Slip op. at 10. The District Court's cursory treatment of this question does not, however, demonstrate that the Speech or Debate Clause bars judicial review, and that clause actually presents no obstacle to this action. Id.

The Speech or Debate Clause, Art. I, § 6, does not bar all judicial review of legislative acts. Powell, 395 U.S. at 503. As the Supreme Court concluded in Powell, "[t]he purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions." Id. at 505. For example, Kilbourn v. Thompson, 103 U.S. 168 (1881), held that the Speech or Debate Clause protected several congressmen from Kilbourn's action for false imprisonment; the Court nevertheless reached the merits of Kilbourn's claim against House employees and ruled that his detention was unconstitutional.

Kilbourn quoted with approval the statement of Justice Hoar of the Massachusetts Supreme Court in Burnham v. Morrissey, 80 Mass. (14 Gray) 226 (1859), concerning judicial review of the internal workings of the Massachusetts House of Representatives (103 U.S. at 199):

> Especially is it competent and proper for this court to consider whether its [the legislature's] proceedings are in conformity with the Constitution and laws, because living under a written Constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of the laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void.

See also Dombrowski v. Eastland, 387 U.S. 82 (1967); Powell, 395 U.S. at 505-06.

The Supreme Court's recent decisions under the Speech or Debate Clause establish that the provision erects no bar to Nixon's claim. In Gravel v. United States, 408 U.S. 606, 620 (1972), the Court reviewed the precedents and concluded: "[t]he three cases [Kilbourn, Dombrowski, and Powell] reflect a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate." The Court noted that the legislative action in Kilbourn was subject to judicial review because its execution "impinged on a citizen's rights. . . ." Id. at 618.

Similarly, Gravel noted that Powell v. McCormack "reasserted judicial power to determine the validity of legislative actions impinging on individual rights." Id. at 620. The Gravel Court emphasized that Speech or Debate Clause protection applies only when there is a threat to legislative independence. Id. at 621. No such threat is posed here, since Nixon does not challenge the substance of the Senate's deliberations on the impeachment articles, but only contests the Senate's noncompliance with the procedural requirements of the Constitution.[4]

The District Court also held erroneously that it could grant no relief against the Secretary of the Senate and the Acting Public Printer (slip op. at 10): "[T]heir functions in this matter are to assist the Senators in conducting the hearings and disseminating the transcripts to Senators not on the Committee." These "internal functions," the District Court held, "are fully protected by the Speech and Debate Clause." Id. The District Court also suggested that a judgment against these employee-defendants would have no effect, because individual Senators themselves could perform the "ministerial functions" of the employee-defendants.

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[4] The District Court offered no explanation for the statement that "the Senate as an entity cannot be effectively sued." Slip op. at 2. This suggestion ignores Moore v. United States House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985), in which this Court held that Representative Moore had standing to challenge a revenue bill since he was deprived of his right to have revenue bills originate in the House. Writing for the majority, Judge Wilkey stated: "[T]he separation-of-powers concerns presented by this case do not deprive the court of power to adjudicate under Article III." The court reached this conclusion despite the fact that "[t]he appellants sued the United States House of Representatives, the United States Senate, the Speaker of the House, the President of the Senate, the Clerk of the House, and the Secretary of the Senate." Id. at 948. (Emphasis added). Moore thus suggests that Nixon can sue the United States Senate.

These statements are contrary to precedents of the Supreme Court and this Court. Kilbourn and Powell held that congressional employees do not enjoy the full protection of the Speech or Debate Clause when they undertake ministerial functions implementing a completed legislative act. In Kilbourn, the House employee performed the purely "ministerial" function of carrying out the House's order to confine Mr. Kilbourn. In Powell, the Clerk of the House undertook the similarly ministerial chore of cutting off Powell's pay, while the Doorkeeper ministerially excluded him from the legislative chamber, as the House ordered. Cf. Doe v. McMillan, 412 U.S. 306 (1973).

Indeed, the District Court's reasoning on this point turns the Speech Or Debate Clause on its head. The justification for allowing suits against congressional employees is that the courts in those instances are deciding cases that involve only the ministerial implementation of a completed legislative act, and thus do not directly intrude on the discretionary actions of the legislators. It is because the employees' functions are ministerial that judicial action is appropriate. As this Court explained in Walker v. Jones, 733 F.2d 923, 932 (D.C. Cir.), cert. denied, 469 U.S. 1036 (1984) (emphasis in original):

> Execution of a decision, even if the decision itself is properly called 'legislative,' is not cloaked with Speech or Debate immunity, for execution or carrying out directions post-dates what the Clause protects -- the process leading up to the issuance of legislative directions.

This Court cannot avoid the constitutional issues in this case on the basis of the District Court's speculation that individual senators might themselves operate the equipment to print the impeachment record and might conduct the administration of the impeachment. Slip op. at 10. The District Court imagined such an unlikely turn of events as a further justification for declining to review the case against the employee-defendants.

First, the District Court's imaginings do not represent what has happened here. It ill graces the courts to concoct such unlikely scenarios as a basis for refusing to hear a constitutional claim.

Second, the Supreme Court specifically refused to rule on this issue in Powell, squarely recognizing that an action solely against members of Congress may be necessary when legislators themselves implement unconstitutional action. The Powell Court wrote: "We need not decide whether under the Speech or Debate Clause petitioners would be entitled to maintain this action solely against Members of Congress where no agents participated in the challenged action and no other remedy was available. Cf. Kilbourn v. Thompson, 103 U.S. 168, 204-205 (1881)."). Powell, 395 U.S. at 506 n.26. Thus, even under the District Court's imagined scenario, Nixon would retain the right to sue individual legislators.

II.

TRIAL BY COMMITTEE VIOLATES THE SENATE'S DUTY TO TRY IMPEACHMENT CASES

This action seeks to vindicate Nixon's right to have the Senate "try" his case, rather than merely vote on it based on a committee report, news summaries or corridor conversation. The Constitution provides that the "President, Vice President and all civil Officers of the United States [including federal judges] shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Art. II, § 4. The Constitution includes few procedural requirements for impeachments, but they are very clear (Art. I, § 3, cl. 6):

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation . . . . And no Person shall be convicted without the Concurrence of two-thirds of the Members present.

The question here is whether the requirement that the Senate "try all Impeachments" bars the use of a committee of fewer than one-eighth of its members to receive all evidence and hear all testimony. The Constitution's prohibition against this shortcut, which was designed to relieve the Senators from constitutional duties they found "dreary," is established by:

(A) the text of the Constitution; (B) the plain intent of the Framers; and (C) the unfairness of a proceeding when more than seven-eighths of the jurors have been excused from paying attention.

A. The Constitutional Text

The key constitutional provision states that the Senate shall have the power to "try all Impeachments." That requirement bars the Senate from shunting to a committee of twelve the actual receiving of evidence. Under Rule XI as now implemented by the Senate, the full Senate no longer "tries" the case, but simply votes on it based on a committee report, much like any piece of legislation.

By using the term "try," the Framers directed the Senate to conduct the entire trial process, including the taking of evidence and the hearing of testimony. This conclusion is based on the ordinary meaning of the word. Black's Law Dictionary, 1358 (5th ed. 1979) defines "try":

> To examine judicially. To examine and investigate a controversy, by the legal method called 'trial,' for the purpose of determining the issues it involves.

That understanding of the term has not changed over time. A dictionary printed in 1780 defined "to try" as, inter alia, "to examine as a judge; to bring before a judicial tribunal." T. Sheriden, A Dictionary Of The English Language (1780).

Leading constitutional scholars have agreed that the constitutional text requires trial before the full Senate.

Prof. Charles Black has written, "The Senate is to 'try' all impeachments, not simply vote on them; the word 'try' is a word used almost invariably with regard to judicial trials." C. Black, Impeachment: A Handbook 10 (1974). Prof. Black concluded that Rule XI "is of dubious constitutionality, in view of the language confiding to 'the Senate,' and not to some part of the Senate, the 'sole Power to try all Impeachments.'" Id. at 12. Prof. Raoul Berger has agreed, writing that "a shift of the Senate's hearing function to a master [or Committee] is of doubtful constitutionality." R. Berger, Impeachment: The Constitutional Problems, 173 (1973).

The other impeachment provisions confirm this conclusion. When Senators are "sitting for that Purpose [of trying impeachments], they shall be on Oath or Affirmation." This provision treats the senators as impeachment jurors by placing them under oath, and certainly contemplates that the "sitting" Senators will be "trying" the case, not merely voting on the outcome based on a committee report. The Constitution also states that "When the President of the United States is tried, the Chief Justice shall preside." (emphasis added.) Again, the understanding is clear that the trial itself will occur in the Senate, with the Chief Justice presiding in presidential impeachments. Surely the Framers did not intend the Chief Justice to preside over a committee hearing.

Finally, this conclusion is further reinforced by comparing the Senate impeachment provisions to the other grants of power to Congress. Article I, § 8 gives Congress the "Power to lay and collect taxes," "to regulate Commerce," and the like. Congress exercises these powers through legislative votes, but the Constitution is silent as to what procedures Congress may use to develop legislation. Congress may use committees to develop legislation, or may act as a committee of the whole. Similarly, Article I, § 2, cl. 5 grants the House of Representatives "the sole Power of Impeachment," leaving to the House the choice of investigating impeachments by committee or as a body; the Constitution is indifferent as to the procedures used. In addition, Article I, § 5 charges that each House "shall be the Judge of the Elections, Returns and Qualifications of its own members," leaving each House free to "judge" those matters (under constitutional criteria) based on whatever record, compiled in whatever manner, that the House or Senate may deem fit.

But the Senate impeachment clause contains the specific procedural prescription that the Senate shall "_try_ all Impeachments." The text leaves no room for delegation of that duty to some fraction of the Senate's membership. Had the Framers intended to give such discretion to the Senate, they would have granted the Senate power merely to "convict," or to "judge," or to vote on them.

The District Court argued that the Senate may conduct an impeachment trial before a committee because the Constitution "does not say that the _full_ Senate must try all impeachments."

Slip op. at 6 (emphasis in original). The argument demands a foolish redundancy of the Constitution. By using the term "Senate" in the impeachment clause, the Framers plainly meant -- and provided for -- the full Senate. The District Court's reasoning would render nonsensical much of Article I of the Constitution. For example, Article I, section 3 states that "The Senate . . . shall be composed of two Senators from each State." Under the District Court's reasoning, that provision must refer only to some of the Senators. If the Framers intended all Senators to be allocated in that manner, according to the District Court, they surely would have written that the entire Senate shall be so chosen.

Similarly, according to the District Court's reasoning, committees of Congress could exercise the specific grants of power in Article I, Section 8 to regulate commerce and to lay taxes. After all, the Framers provided only that "The Congress" shall have the powers to tax or to regulate commerce. According to the District Court, the Framers certainly would have granted those powers to "the full Congress" if they had meant to reserve legislative powers to the entire body. The absurdity of this result illustrates the District Court's error.

By the same token, the District Court attacked a straw man when it argued that the verb "try" does not mean that an impeachment trial must include "all the requirements of modern criminal due process." Slip op. at 6. We have never made such a claim. We do insist, however, that when the Framers directed the Senate to "try all Impeachments," they intended the Senate actually to conduct a trial. The District Court's holding to the contrary is totally without foundation and is contrary to the Constitution.

B. The Intent Of The Framers

The Framers were familiar with impeachment as an essential weapon of Parliament in its struggles with the British monarchy. R. Berger, Impeachment, at 30. Indeed, as the Framers convened the Constitutional Convention, the impeachment of Warren Hastings preoccupied Parliament, a fact the Framers cited in the debates. See 2 M. Farrand, Records of the Federal Convention 550 (Sept. 8, 1787) (G. Mason) [hereinafter Farrand].

1. A "Numerous" Impeachment Court

At the Convention, the first formal proposal for an impeachment provision came in the "Virginia Plan" presented in late May 1787, which provided for impeachment trials to be held in the judiciary. 1 Farrand at 22 (Randolph). The "New Jersey Plan," submitted the following month, also called for the courts to hear impeachment trials. 1 Farrand at 241, 244 (June 13, 1787) (Paterson). Alexander Hamilton, representing New York, endorsed impeachment trials in the judiciary. 1 id. at 292-93 (June 18, 1787) (Hamilton).

But the Convention's committee of detail proposed in late July that impeachments be tried "before the Senate and the judges of the federal judicial Court." 2 id. 136, 159 (emphasis added). At that juncture, the Convention's debates reflect general agreement that an impeachment mechanism was needed, see 2 id. at 64 (Wilson), 65 (Mason, Franklin, Gouvernor Morris, Madison), 66 (Gerry), 67 (Randolph), but several delegates favored placing the impeachment trials in the courts. Id. at 66-67 (King, Randolph). The delegates approved including an impeachment mechanism in the Constitution, but postponed the question of how it should operate.

In late August, the Convention again considered impeachment on John Dickinson's motion that judges be "remove[d] by the Executive on the application (by) the Senate and House of Representatives." 2 Farrand at 428 (Aug. 27, 1787). Dickinson based his motion on the English method for removing judges by "address." Several state constitutions had removal by address at the time, which required no statement of charges against the judge, nor a trial.

Gouvernor Morris objected to Dickinson's proposal on the ground that removal of judges "without a trial" would be "arbitrary." Wilson of Pennsylvania and Randolph of Virginia agreed that such a remedy would weaken the independence of judges, 2 id. at 429, and the convention defeated the proposal.

A week later, another committee of detail proposed the following provision: "The Senate of the United States shall have power to try all impeachments; but no person shall be convicted without the concurrence of two thirds of the Members present." Madison moved four days later for impeachment trials to be heard by the Supreme Court, but his motion was defeated, 9-2. 2 id. at 551 (Sept. 8, 1787). In opposing Madison's motion, Gouvernor Morris argued that "no other tribunal than the Senate could be trusted. The Supreme Court were too few in number and might be warped or corrupted." Id. (emphasis added).

Providing a "numerous court" of impeachment was important to the Framers, whose system of checks and balances reflected a sophisticated understanding of the fallibility and corruptibility of individuals. Hamilton later explained in the Federalist No. 65 why impeachment trials were committed to the Senate and not to the Supreme Court (Federalist Papers No. 65 at 398 (emphasis added)):

> It is much to be doubted whether the members of that tribunal [the Supreme Court] would at all times be endowed with so eminent a portion of fortitude as would be called for in the execution of so difficult a task; and it is still more to be doubted whether they would possess the degree of credit and authority which might, on certain occasions, be indispensable towards reconciling the people to a decision that should happen to clash with an accusation brought by their immediate representatives [the House of Representatives] . . . . The hazard, in both these respects, could only be voided, if at all, by rendering that tribunal more numerous than would consist with a reasonable attention to economy. The necessity of a numerous court for the trial of impeachments is equally dictated by the nature of the proceeding . . . . There will be no jury to stand between the judges who are to pronounce the sentence of the

> law and the party who is to receive or suffer it. The awful discretion which a court of impeachments must necessarily have to doom to honor or to infamy the most confidential and the most distinguished characters of the community forbids the commitment of the trust to a small number of persons.

See Federalist Papers, No. 79 (Hamilton), at 474 (judges may be impeached by the House "and tried by the Senate").[5]

Thus, the Framers selected the Senate as the forum for impeachment trials because they feared that a smaller tribunal might lack the courage or integrity to withstand the political passions of the day and remain true to its constitutional duty. The Framers selected the Senate for impeachment trials precisely because it is "numerous" -- "more numerous than would consist with a reasonable attention to economy."

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[5] The debates at the state ratifying conventions provide some further evidence of the Framers' intent that the full Senate conduct the impeachment trial. At the North Carolina convention, Mr. McClaine discussed impeachment of the President, noting, "The House of Representatives is to have the sole power of impeachment and the Senate the sole power of trying," adding that "the Senate [is] a very proper body to try him." 4 J. Elliot, The Debates of the State Conventions 44, 45 (1896) (emphasis added). In the Virginia Convention, George Mason objected to the impeachment provision as inadequate for policing senatorial corruption (3 id. at 402): "The senators were to try themselves. If a majority of them were guilty of the crime, would they pronounce themselves guilty?" And in the Pennsylvania Convention, James Wilson observed that, compared to the House of Representatives, the Senate had three additional powers that might require it to remain in session longer. He described one of those powers as "trying impeachments." 2 id. at 513 (1896) (emphasis added). Each comment reflects the understanding that the full Senate would conduct impeachment trials.

In contrast, the procedural shortcut embraced by Impeachment Rule XI ensures that more than seven-eighths of the Senators will not really know the facts of the case. The use of a Rule XI committee shifts the basic decision on impeachment from 100 senators to twelve, thus depriving the vast majority of Senators of the opportunity to hear the evidence. By elevating the interests of "economy" over the Senate's constitutional duties, Rule XI and Resolution 128 defeat the Framers' intent that the full "numerous" Senate shall "try all Impeachments."

2. Preserving Judicial Independence

The Framers did not seek to streamline impeachment, but rather to make it burdensome, solemn, and grave. The Senate based its insistence upon trial before the full Senate on their conviction that the preservation of liberty requires an independent judiciary, a conviction which also underlies Article III's grant of life tenure and the bar against reduction of judicial compensation. Madison told the Convention that judges should not depend on Congress for reappointment "[b]ecause they might be tempted to cultivate the Legislature, by undue complaisance, and thus render the Legislature the virtual expositor, as well as the maker of the Laws." 2 Farrand at 34.

In the Federalist No. 78, Hamilton expressed similar concerns, insisting that life tenure for judges is an "excellent barrier to encroachments and oppressions of the representative body and steady, upright, and impartial adminstration of the laws." Of the three branches of government, he continued, the judiciary "will always be the least dangerous to the political rights of the Constitution," and "all possible care is requisite to enable it to defend itself against [the other branches'] attacks." Id.

Hamilton warned that the judiciary "is in continual jeopardy of being overpowered, awed or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security." Id. Hamilton further stated (Id.):

> If, then, the courts of justice are to be considered as bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

In the very next essay in the Federalist series, Hamilton noted that upon impeachment by the House, judges would be "tried by the Senate," which he called "the only provision on the point which is consistent with the necessary independence of the judicial character." Federalist No. 79 at 474 (emphasis added). The notion that the Senate should conduct impeachment proceedings like other legislative business conflicts with the clear intent of the Framers and disregards their concerns for an independent judiciary. [6]

C. A Fair Impeachment Trial Is Not Possible When Seven-Eighths Of The Decision-Makers Do Not Hear The Evidence

The procedural shortcut achieved by Rule XI does not adequately comply with the constitutional command that the Senate "try all Impeachments." Expediency and convenience are inadequate substitutes for constitutional requirements. As Senator Evans stated during the Claiborne impeachment proceedings: "The trial of an impeachment is no place for shortcuts or haste. Justice may be elusive, but that is no excuse for a half-hearted try to find it." 132 Cong. Rec. S16822 (daily ed. Oct. 16, 1986).

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[6] The District Court noted that the House of Lords used an impeachment trial committee "in the early part of the 17th century." Slip. op. at 4. The last such committee was convened in 1624, more than 160 years before the Constitutional Convention. There were at least six impeachment trials in the House of Lords between 1700 and 1780, none of which referred to committees for hearing evidence. Hatsell, Precedents and Proceedings in the House of Commons (1818 ed.). There is no valid historical basis for claiming that the Framers intended impeachment trials to be conducted before Senate committees based on superceded precedents of the House of Lords that were then more than 160 years old.

Similarly, appellees can draw little support from Jefferson's Manual of Parliamentary Practice and Rules of the House of Representatives. The Manual observes that the House of Lords could use an impeachment committee to take evidence, but it is not necessarily authoritative. Jefferson's only citation for that assertion was a 1726 treatise that itself cited as support only a reported case from 1377 concerning late King Edward III's mistress, Alice Pierce, in a proceeding that was not even an impeachment but was a trial on complaint. J. Selden, Judicature In Parliament at 120, 123 (1726). Indeed, Jefferson was in Paris during the Constitutional Convention, and wrote his Parliamentary Manual more than a decade after ratification; accordingly, his knowledge of the Convention was secondhand. His Manual provides weak support for a position contrary to the constitutional text and the plain intent of the Framers, and which the Senate did not implement until 199 years after the Convention.

During the Claiborne debate, several Senators doubted the adequacy of trial by committee. Sen. Levin stated (132 Cong. Rec. S16823 (daily ed. Oct. 16, 1986)):

> [I]t was not adequate to let the Senate make findings in those disputed areas where witness demeanor or credibility is critical to the process of determining what the facts are. The Senate, as a finder of fact, did not hear or see a single witness. And, as a result, our ability to fairly reach decisions, when the facts were in dispute, was restricted.
>
> * * * *
>
> When we voted not to hear any additional witnesses, we set up a process which made it impossible for the Senate, as the finder of fact, to fully and fairly evaluate the credibility of witnesses.

Sen. Bingaman complained that the full Senate, without hearing the witnesses, could not make an independent determination of Judge Claiborne's state-of-mind concerning the allegations against him (Id. at S15762):

> To make that type of independent determination of his state of mind, I believe it would be essential to hear witnesses and judge the credibility of those witnesses. For the Senate to convict . . . , the Senate must conduct itself as a factfinding body and cannot delegate that responsibility to a special committee. In my opinion, putting the record of evidence

> presented to the committee into the possession of all Senators is not an adequate substitute for Senators hearing the witnesses present their case.

Sen. Evans echoed this dissatisfaction with the trial committee (id. at S16821):

> In a matter of this gravity it is wholly right and proper that we avail ourselves of all resources which might assist us in reasoned deliberations. Yet, in this case we chose to make do with incomplete information and a nonstandard of review. Although all 100 of us sat in judgment, only a chosen few heard testimony or examined witnesses.
>
> . . . . An incomplete record is flatly insufficient as a basis for a final decision. But we voted not to have the full Senate hear witnesses or have an opportunity to question the accused.

There is no other fact-finding proceeding in our system of justice in which a court could compel Nixon to submit his case to jurors who did not hear the evidence. It makes no sense for one of the gravest proceedings in our polity to be the only proceeding decided by jurors who have not heard the witnesses.

Senator Heflin has described the inadequacy of the Rule XI procedure in the Claiborne impeachment:

> The other 88 members of the Senate did not have the advantage of hearing the testimony and arguments by counsel. The transcript of the hearing on Judge Claiborne's impeachment totaled over 3,500 pages. Therefore, it is highly improbable that any Senator had the time to thoroughly review this material. Few Senators

> other than the 12 members of the Impeachment Committee were familiar with all the elements of the case.

Heflin, "The Impeachment Process: Modernizing An Archaic System," 71 Judicature 123, 124 (Aug.-Sept. 1987). Another member of the Claiborne trial committee, Senator McConnell, has written that the Rule XI committee "exerted tremendous influence on the Senate's ultimate decision." McConnell, Reflections on the Senate's role in the Judicial Impeachment Process and Proposals for Change, 76 Ky. L. J. 739, 750 (1987-88).

The observations of these members of a Rule XI Committee flatly contradict the District Court's suggestion that the committee plays a neutral role in the impeachment process. Slip op. at 3. Prior experience and common sense clearly indicate that the twelve committee members will exercise great influence over their colleagues. Furthermore, Article I, § 3, cl. 6, expressly directs that the Senate may convict in an impeachment only upon a two-thirds vote. The Rule XI procedure prevents the accused from making his case directly to eighty-eight senators, even though he needs only thirty-four votes in order to defeat impeachment. Rule XI thereby effectively denies Judge Nixon a fair opportunity to oppose the Articles of Impeachment.

The concerns of these senators are heightened in this case because the allegations against Nixon turn in large part on the credibility of witnesses. The two main witnesses against Nixon present difficult credibility issues. As we noted, Wiley Fairchild has recanted critical parts of his trial testimony, explaining that he gave false testimony to curry favor with the prosecutor. Nixon v. United States, 703 F. Supp. 538, 552-53 (S.D. Miss. 1988), appeal pending, No. 89-4127 (5th Cir., argued on June 5, 1989).

Similarly, Bud Holmes was indicted on five counts of perjury and pled guilty to contempt of court in the form of making false statements to the grand jury. Holmes admitted that he lied to the grand jury on three separate occasions and that he indicted Drew Fairchild, Wiley's son, in order to pressure Drew to pay legal fees to Bill Porter, Holmes' good friend. United States v. Nixon, No. 85-00012(L) (S.D. Miss.) Trial Tr. at 837-44. In House testimony last July, Holmes repudiated both a sworn affidavit he had signed four months earlier, and sworn deposition testimony he gave in a civil lawsuit in 1987. Judge Walter L. Nixon, Jr., Impeachment Inquiry," Hearings Before the Subcomm. On Civil And Constitutional Rights of the House Judiciary Comm., 100th Cong., 2d Sess. 310-15. (1988).

In such situations, the courts have recognized that demeanor evidence is critical. See, e.g., Universal Camera Corp., 340 U.S. 474, 495-96 (1951); United States v. Nelson, 476 F.2d 254, 256 (9th Cir. 1973); NLRB v. Dinion Coil Co., 201 F.2d 484 (2d Cir. 1952) (Frank, J.). Judge Jerome Frank described the importance of demeanor evidence in his treatise, Law and the Modern Mind 109 (1930):

> [Judges] have called attention, as of the gravest importance, to such facts as the tone of voice in which a witness's statement is made, the hesitation or readiness with which his answers are given, the look of the witness, his carriage, his evidences of surprise, his gestures, his zeal, his bearing, his expression, his yawns, the use of his eyes, his furtive or meaning glances, or his shrugs, the pitch of his voice, his self-possession or embarrassment, his air of candor or of seeming levity.

Credibility inferences based on demeanor evidence call for subjective analysis, as every judge or juror brings to bear his own experiences and knowledge of life. The Senate will deny Nixon his right to a fair trial if eighty-eight senators are never in a position to gauge the credibility of the witnesses or observe their demeanor.

Finally, the use of a Rule XI committee announces to the senators and the nation a message that is fundamentally at odds with the constitutional scheme: that impeachment is a routine matter, relegated to a committee and completed with the least possible disruption to the real business of the Senate. That message encourages senators to rely on hearsay accounts in the press or on staff summaries, or to follow the vote of a respected colleague on the committee.

As a practical matter, this situation leaves the impeachment respondent with a sharply reduced likelihood of success. Articles of Impeachment, like an indictment, are received from the House of Representatives with a presumption of their substance. As Hamilton wrote in Federalist No. 65, it takes great "credit and authority" for a decision-maker to "clash with an accusation brought" by the House of Representatives. If the evidence on those allegations is heard by only a handful of the senators, then the impeachment trial is transformed from a grave confrontation of the branches of government into a bureaucratized bit of legislative business to be completed with the least possible fuss.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that this Court reverse the judgment of the United States District Court for the District of Columbia and declare that Impeachment Rule XI and Resolution 128 violate the Constitution by denying appellant a trial before the Senate.

Respectfully submitted,

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Date: July 14, 1989

[SCHEDULED TO BE ARGUED ON OCTOBER 17, 1989]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5188

THE HONORABLE ALCEE L. HASTINGS,

Appellant,

v.

THE UNITED STATES SENATE, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLEES' MOTION TO INCORPORATE ARGUMENT PORTIONS OF BRIEF IN RELATED APPEAL

In this appeal Judge Alcee L. Hastings appeals from the decision of the district court dismissing his challenge to the United States Senate's trial of his impeachment on charges preferred by the House of Representatives. The Court has ordered the oral argument of Judge Hastings' appeal calendared on the same day before the same panel that will be hearing Nixon v. United States Senate, No. 89-5191 (D.C. Cir.), which is Judge Walter L. Nixon, Jr.'s challenge to the Senate's trial of his impeachment. Judge Nixon intervened in Judge Hastings' civil action in the district court, and filed a complaint naming the identical defendants. The district court dismissed both judges' complaints in the same memorandum and order. Hastings v. United States Senate, C.A. No. 89-1602-GAG (D.D.C. July 5, 1989). Judges Hastings and Nixon filed separate appeals in this Court.

Appellees respectfully request leave to incorporate by reference the argument in their brief in Nixon v. United States Senate, No. 89-5191, in their brief in this appeal. Our briefs in both appeals are due on September 11, 1989. Both appeals present an identical question about the constitutionality of the Senate's use of a committee to receive evidence for the Senate's consideration in trying articles of impeachment. Judge Hastings' appeal also presents several other constitutional claims not present in Judge Nixon's case, namely, issues of double jeopardy, diminution of compensation, and unconstitutional delay.

Both appeals also present the same issues concerning whether the complaints are justiciable. Judge Hastings has chosen not to brief a number of those issues, including the Speech or Debate Clause bar to adjudicating these complaints, in his opening brief, notwithstanding that these barriers to justiciability were the primary basis for the dismissal of both complaints in the court below. We are briefing these issues in our brief in No. 89-5191 in response to Judge Nixon, who does brief these issues extensively.

Leave to incorporate the overlapping argument portion of our brief in No. 89-5191 in our brief in this appeal will permit us to avoid unnecessarily repeating these arguments in this brief and enable us to focus our brief in this appeal on the factual and legal issues that relate to Judge Hastings' appeal only. Counsel for Judge Hastings has consented to our motion to incorporate here arguments from our brief in the related appeal, and we will, of course, serve both briefs on opposing counsel.

Respectfully submitted,

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Dated: August 29, 1989

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5188 **September Term, 19**

The Honorable Alcee M. Hastings,
U.S. District Judge,
Appellant

Calendared for: 10/17/89

and
Walter L. Nixon, Jr.

v.

The United States Senate,
The Impeachment Trial Committee,
The Honorable Walter J. Stewart,
of the Senate and
The Honorable Joseph E. Jenifer as Acting
Public Printer of the United States

United States Court of Appeals
For the District of Columbia Circuit
FILED SEP 07 1989
CONSTANCE L. DUPRÉ
CLERK

ORDER

Upon consideration of appellees' motion to incorporate argument portions of brief in related appeal, it is

ORDERED, by the Court, that the aforesaid motion is granted.

For the Court:
Constance L. Dupre, Clerk

By: Linda E. Jones
Linda E. Jones
Deputy Clerk

No. 89-5188

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE HONORABLE ALCEE L. HASTINGS,

Appellant,

v.

THE UNITED STATES SENATE, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLEES

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici.

All parties, intervenors, and amici appearing below and in this Court are listed in the Brief of Appellant.

(B) Ruling Under Review.

The ruling under review, Hastings v. United States Senate, C.A. No. 89-1602 (D.D.C. July 5, 1989) (Gesell, J.), is unreported and appears as J.A. Exh. 3 (memorandum) and 4 (order).

(C) Related Cases.

This case was previously before this Court on appellant's emergency motion for injunctive relief pending appeal and for expedited consideration, which the Court denied. Order of July 10, 1989 (per curiam)(Ruth B. Ginsburg, Silberman, Sentelle, JJ.).

Nixon v. United States Senate, No. 89-5191 (D.C. Cir.), is a related case presenting some of the same issues and involving the same defendants.

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No. 89-5188

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE HONORABLE ALCEE L. HASTINGS,

Appellant,

v.

THE UNITED STATES SENATE, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLEES

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court correctly ruled that Judge Hastings' complaint seeking judicial intervention in the Senate's performance of its impeachment trial function is non-justiciable under the Speech or Debate Clause and the separation of powers.

2. Whether the district court correctly held alternatively that Judge Hastings' objection to the Senate's use of a committee to hear evidence in his impeachment proceeding fails to state a claim of a constitutional violation.

3. Whether the district court correctly held alternatively that the double jeopardy clause of the Fifth Amendment does not apply to impeachment proceedings.

4. Whether the district court correctly held alternatively that the Senate's deferral of Judge Hastings' application for funds for his defense until after the impeachment proceedings does not "diminish" his compensation under Article III, section 1.

5. Whether Judge Hastings' contention that the lapse of time since he allegedly engaged in the conduct charged by the House bars his impeachment trial on Impeachment Articles I through XV fails to state a constitutional claim.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

Pertinent constitutional provisions and Senate rules are set forth in a separately bound addendum.

COUNTER STATEMENT OF THE CASE

This appeal concerns the impeachment trial of United States District Judge Alcee L. Hastings of the Southern District of Florida, which is currently in progress in the United States Senate. The action underlying the appeal was commenced by Judge Hastings to seek preliminary injunctive relief halting his impeachment trial in the Senate. The appeal is from the district court's decision denying Judge Hastings' application for interim injunctive relief and dismissing his complaint.

A. The Commencement of Impeachment Proceedings

On August 3, 1988, the House of Representatives adopted House Resolution 499, 100th Congress, impeaching District Judge Alcee L. Hastings of high crimes and misdemeanors. 134 Cong. Rec. H6193 (daily ed.). House Resolution 499 sets out seventeen articles of impeachment alleging that Judge Hastings engaged in a corrupt conspiracy in 1981 to obtain money from parties in a criminal case pending before him (Article I), that he testified falsely at his 1983 criminal trial for conspiracy (Articles II-XV), that in 1985 he improperly revealed confidential wiretap information (Article XVI), and that through the foregoing conduct Judge Hastings brought disrepute on the federal courts and the administration of justice (Article XVII). 134 Cong. Rec. H6180-82.1/

Judge Hastings had been acquitted on criminal charges at trial, but his co-defendant, William A. Borders, Jr., whose trial was severed, was convicted for conspiring with Judge Hastings, and his conviction was affirmed. United States v. Borders, 693 F.2d 1318 (11th Cir. 1982), cert. denied, 461 U.S. 905 (1983). Following Judge Hastings' acquittal, a complaint was filed against him under 28 U.S.C. § 372(c)(1982), the Judicial Councils Reform and Judicial Conduct and Disability

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1/ The articles of impeachment are reprinted in the Joint Appendix ("J.A."), at Exh. 7.

Act of 1980. After three years of investigation, an investigating committee of five judges unanimously concluded in 1986 that Judge Hastings had engaged in conduct that might constitute grounds for impeachment.[2] The Judicial Council of the Eleventh Circuit adopted the report and certified to the Judicial Conference its conclusion that impeachment may be warranted. See Hastings v. Judicial Conference, 829 F.2d 91, 96 (D.C. Cir. 1987), cert. denied, 108 S.Ct. 1487 (1988). The Judicial Conference concurred in the Judicial Council's finding, id. at 97, and, through Chief Justice Rehnquist, certified in 1987 to the House of Representatives its determination "that consideration of impeachment may be warranted."[3]

Following Judge Hastings' impeachment, the House exhibited the articles of impeachment to the Senate, and an oath was administered to all Senators. 134 Cong. Rec. S11168-70 (daily ed. Aug. 9, 1988).[4] The Senate then adopted Senate Resolution

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2/ See In the Matter of the Impeachment Inquiry Concerning U.S. District Judge Alcee L. Hastings: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 100th Cong., 1st Sess. (1987) [hereinafter Hearings] (Appendix 1) (reprinting investigating committee report).

3/ Miscellaneous Materials: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 100th Cong., 2d Sess. 903 (1989) (Appendix V) (reprinting certificate). Subsequently, a second complaint to the Eleventh Circuit was filed against Judge Hastings in 1986. This complaint, which concerned the alleged improper disclosure of confidential wiretap information, was investigated but not finally resolved by the Judicial Council, and ultimately led to Article XVI, whose trial Judge Hastings has conceded is proper.

4/ Defendants' Appendix in Opposition to Plaintiff's Motion for Preliminary Injunction: Record of Senate Proceedings in (footnote continued)

456, 100th Congress, which provided for the issuance of a summons commanding Judge Hastings to file an answer to the impeachment articles. Id. at S11170, Def. App. 4.[5] Because the impeachment articles were exhibited only weeks before the 100th Congress's scheduled adjournment sine die, "[i]n fairness to both the House of Representatives and Judge Hastings," the Senate ordered the Committee on Rules and Administration ("the Rules Committee") to report on the Senate's authority to continue the impeachment proceedings in the next Congress, and on the appropriate use of Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, which authorizes the appointment of a committee to receive and to report evidence to the Senate with respect to articles of impeachment. Id. at S11170 (Sen. Byrd), Def. App. 4.

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the Impeachment of Judge Alcee L. Hastings ("Def. App.") 2-4. Art. I, sec. 3, cl. 6 provides that "[w]hen sitting for th[e] Purpose" of trying impeachments, the Senate "shall be on Oath or Affirmation." Following the continuation of proceedings to the next Congress, newly elected Members of the Senate were sworn. 135 Cong. Rec. S2550 (daily ed. Mar. 15, 1989), Def. App. 280. The oath, the form of which is prescribed in the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, commits each Member to "do impartial justice according to the Constitution and laws." S. Doc. No. 3, 101st Cong., 1st Sess. 20 (1989). Four senators who were members of the House when it voted to impeach Judge Hastings were excused, at their request, from participation in the impeachment trial. 135 Cong. Rec. S2549-50 (daily ed. Mar. 15, 1989), Def. App. 279-80; see id. at S2802 (daily ed. Mar. 16, 1989) (Sen. Mitchell) (former House members excused to protect against "appearance of prejudgment"), Def. App. 295.

[5] The summons and Judge Hastings' answer are reprinted in id. at S12150-55 (daily ed. Sept. 9, 1988), Def. App. 57-62.

Impeachment Rule XI authorizes the appointment of a Senate committee "to receive evidence and take testimony" and to "report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before [the] committee." Provisions Addendum to this Brief ("Prov. Add.") at A-5. Rule XI provides that the committee's report of its evidentiary proceedings "shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate." Id. The Rule further stipulates that "nothing ... shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate." Id.

On September 22, 1988, after receiving written submissions from the House Managers and Judge Hastings, and citing precedents from both English practice and prior impeachments under the Constitution, the Committee found "that the Senate has clear authority to continue in the next Congress proceedings on the impeachment ... and to appoint ... a committee to perform the duties and to exercise the powers provided for in [Rule XI]." S. Rep. No. 542, 100th Cong., 2d Sess. 2 (1988). On the question of using a Rule XI committee, the Rules Committee noted the remarks of Senator Mathias, who had chaired the committee that the Senate used in 1986 in the impeachment trial of District Judge Harry E. Claiborne:

> In an ideal world we might all prefer that each Senator personally hear all impeachment evidence, just as we might prefer that each Senator personally hear witnesses to every matter bearing upon war or peace or other aspects of the Nation's welfare that we are called upon to consider. However, we are required of necessity to learn through the study of printed records about many of the important matters which compete for our attention.

Id. at 43.

While reaffirming the Senate's power to appoint impeachment trial committees, the Rules Committee recommended that the Senate defer a decision whether to use a committee to take evidence in this particular impeachment until it had an opportunity to hear from the parties. Id. at 100. Accordingly, on September 30, 1988, the Senate continued the proceedings until the 101st Congress and ordered the Rules Committee to consider further whether to appoint a committee. S. Res. 480, 100th Cong., 2d Sess. §§ 1-2 (1988), 134 Cong. Rec. S13750 (daily ed.), Def. App. 95-96.

The Rules Committee heard from the parties on January 26, 1989. Impeachment Trial Procedures: Hearing Before the Senate Comm. on Rules and Administration, 101st Cong., 1st Sess., S. Hrg. No. 101-3 (1989). Judge Hastings opposed the appointment of a committee and sought the taking of all evidence before the full Senate. Id. at 25-27. The House supported the Senate's authority to use a committee, but took no position on the use of a committee in this case other than to oppose bifurcating the taking of evidence between a committee and the full Senate. Id. at 3-5.

The Rules Committee recommended that the precedent established in the Claiborne impeachment be followed and that a Rule XI committee be appointed to take evidence:

> [T]he right of the parties to a fair proceeding will best be served through the use of a Rule XI committee. Use of a committee to take evidence will permit twelve Senators to devote their attention to the evidence throughout the course of the parties' presentation; it will ensure that the parties have a full opportunity to present their cases while, at the same time, the legislative work of the nation is carried on.

S. Rep. No. 1, 101st Cong., 1st Sess. 70 (1989). The Committee found that, because of the unlikelihood that all Members of the Senate would be able to attend all sessions of a lengthy trial on the Senate floor, "a trial before the full Senate would honor form over substance and provide only an illusion of fairness, while the use of an impeachment committee would assure that the Senators appointed to the committee devote their time and attention to the case for its duration." Id. at 71. The Rules Committee recommended that the proceedings of the impeachment committee be televised to all Senate offices and videotaped so that Members "may examine the proceedings as their schedules permit, without disruption of the other legislative responsibilities of the Senate during this trial." Id. at 112. The Rules Committee further proposed that the impeachment committee provide Members with a neutral summary of the evidence reported by the committee to assist Members in their review of the record and that floor consideration be delayed for a period after the committee's completion of its proceedings to assure that Members have a full opportunity to familiarize themselves with the evidentiary record. Id. at 112-13.

Finally, the Rules Committee recommended that motions to dismiss the articles of impeachment without a trial, which Judge Hastings had expressed his intent to file, be heard and resolved by the full Senate before any Rule XI committee was appointed. Id. at 114. The Committee declined to make a recommendation on a request by Judge Hastings for counsel fees, which it concluded was within the discretion of the Senate. Id. at 113.

In accord with the Rules Committee's recommendation, S. Res. 39, 101st Cong., 1st Sess. (1989), 135 Cong. Rec. S1162 (daily ed. Feb. 2, 1989), Def. App. 269, the Senate received from Judge Hastings dispositive motions relating to all but one of the articles of impeachment. He moved to dismiss without trial the first fifteen articles, charging conspiracy and false statements, on the grounds (1) that his acquittal in the criminal conspiracy trial barred his trial on impeachment for similar accusations, and (2) that the lapse of time since the occurrence of the alleged conduct barred trial on these articles. Judge Hastings argued that Article XVII should be dismissed because its cumulative allegations do not state a distinct impeachable offense.

The motions were thoroughly briefed, see S. Doc. No. 4, 101st Cong., 1st Sess. (1989), and argued to the full Senate on the floor in two hours of oral argument in which Judge Hastings personally participated, 135 Cong. Rec. S2550-64 (daily ed. Mar. 15, 1989), Def. App. 280-94. Following two hours of closed deliberation,[6] the Senate voted to reject Judge Hastings' motions to dismiss by votes of 92-1 and 93-0 respectively. Id. at S2802-03 (daily ed. Mar. 16, 1989), Def. App. 295-96.[7] The Senate then adopted the Rules Committee's recommendation and directed the appointment of a Rule XI committee of twelve Members. S. Res. 38, 101st Cong., 1st Sess. (1989), 135 Cong. Rec. S2803 (daily ed. Mar. 16, 1989), Def. App. 297-99.

6/ Like a judicial court's closed conferences, the Senate historically deliberates on all matters in an impeachment trial in closed session. Rule XX, S. Doc. No. 101-3, at 17. One senator, Senator Arlen Specter, the Vice Chairman of the Rule XI Committee that was subsequently appointed, filed a statement explaining his vote on the motions to dismiss. 135 Cong. Rec. S2804 (daily ed. Mar. 16, 1989), Def. App. 300.

7/ Although the Senate exercised its discretion not to dismiss the articles without a trial, any Member remains free to vote to acquit Judge Hastings for any reason, including agreement with his position on these questions. The Senate does not adopt instructions guiding the ultimate decisions of its Members whether to convict or to acquit, and the Senate's denial of Judge Hastings' motions to dismiss should not be understood to impose any such constraint on individual Senators. See, e.g., 4 Cong. Rec., Pt. 7, at 158, 343, 357 (1876) (Senate overruled former Secretary of War Belknap's plea that his resignation barred his trial on impeachment, but then, after trial, acquitted him on all articles based on views of more than one-third of senators that resignation barred impeachment); 132 Cong. Rec. S15506-07 (daily ed. Oct. 7, 1986) (Senate denied Judge Claiborne's motion to designate "beyond a reasonable doubt" as standard of proof, leaving it to each Member to apply his or her own standard of evidence).

The Rule XI Committee conducted pretrial proceedings to prepare the case for trial. In response to Judge Hastings' request for unprecedented discovery in an impeachment trial, the Committee requested the House to provide various documentary materials to Judge Hastings, id. at S6450 (daily ed. June 9, 1989), Def. App. 576-78, assisted him in obtaining documents from the Department of Justice, Def. App. 579, 1055-56, 1066-67, 1118, and agreed to require a limited number of pretrial examinations of witnesses designated by him, id. at S6452, S6454, Def. App. 947-49, 1063.

The Committee also considered Judge Hastings' unprecedented pretrial application that the Senate provide funds for his defense. Judge Hastings sought funds for 1500 hours of attorneys' time already spent, 4000 hours of anticipated future attorneys' time, and transportation, accommodations, paralegal, secretarial, and other office expenses. Def. App. 333-42. The Senate has never paid defense counsel fees in an impeachment proceeding. At an hourly rate of $90, one rate that Judge Hastings cited to the Committee, for attorneys' time, and utilizing Judge Hastings' estimate for other expenses, this request would have totaled $725,000. The only prior request for fees, a request by Judge Charles Swayne for reimbursement following his acquittal by the Senate in 1905, was not granted. The Hastings Committee "determined that it will not recommend to the Senate that the Motion Requesting Funds for Respondent's Defense be granted. Judge Hastings may renew his request for defense funds at the close of the Senate's proceedings on the Articles of Impeachment." 135 Cong. Rec. S6451 (daily ed. June 9, 1989), Def. App. 789.

B. Proceedings in the District Court

Judge Hastings filed this action in the district court on June 1, 1989, against the Senate, the Impeachment Trial Committee, the Secretary of the Senate, and the Acting Public Printer of the United States. Judge Hastings alleged that the doctrines of double jeopardy and laches barred his trial on Impeachment Articles I through XV on account of his prior criminal acquittal more than five years earlier (Counts 1-3); that Article XVII, which alleged cumulative conduct, did not state an impeachable offense that could be tried consistently with due process (Count 4); that the Senate's use of a Rule XI committee to compile an evidentiary record is unconstitutional on its face and as applied in this impeachment (Counts 5-6); that the Senate's denial of Judge Hastings' request for funds for his defense violated the Compensation Clause and the Sixth Amendment of the Constitution (Counts 7-8); that the pretrial procedures and trial schedule adopted by the Committee deprived him of a fair trial (Counts 9-10), and that, in conjunction with the history of investigative and prosecutorial actions against Judge Hastings, his trial on impeachment charges violated his fundamental rights (Count 11). J.A. Exh. 1, at 28-41.

Judge Hastings sought a declaratory judgment that his trial on the charges, and under the procedures, that he complained of was unconstitutional. He also requested injunctive relief "if and to the extent necessary ... to assure that the exercise of the Senate's jurisdiction and power in this case of impeachment conform to the essential requirements established by the Constitution." Id. at 43. He specifically sought to enjoin the Secretary of the Senate from disbursing funds to pay the Committee's staff salaries or other expenses and from taking any actions with respect to orders or reports of the Committee and to enjoin the Acting Public Printer from printing or distributing the Committee's reports, transcripts, or orders. Id. at 43-44. On June 13, 1989, Judge Hastings moved for a preliminary injunction, running against the Secretary and the Public Printer, to arrest the commencement of the Committee's evidentiary proceedings on July 10, 1989. J.A. Exh. 5. Defendants moved to dismiss Judge Hastings' complaint as non-justiciable under the Speech or Debate Clause, the separation of powers, and the textual commitment of impeachment trial power to the Senate and for failure to state a claim of a constitutional violation. J.A. Exh. 6.

Following briefing and argument, on July 5, 1989, the district court denied Judge Hastings' preliminary injunction motion and dismissed his complaint. J.A. Exh. 4. We describe the district court's ruling more fully in our brief in No. 89-5191 (at pages 6 - 8), but in sum the court held that "[i]nsofar as Judges Hastings and Nixon contend that they each have an individual right to an impeachment trial before the full Senate and that a federal district court may supervise the Senate's procedures for impeachment, they are mistaken." J.A. Exh. 3, at 4. The court dismissed Judge Hastings' complaint, because "[d]ue to the political question raised, for prudential reasons, and in recognition of the Speech and Debate Clause, the Court finds the case non-justiciable and it declines to become involved in monitoring the Senate's constitutionally-assigned proceedings." Id. at 11.

The court also rejected the claims asserted only by Judge Hastings. The court held that Judge Hastings' attempt to apply double jeopardy principles to bar the trial of impeachment articles similar to the criminal charges on which he was acquitted was "premised on a fundamental misapprehension," because "impeachment is not a criminal proceeding." Id. at 7. The court also "reject[ed] Judge Hastings' ineffective assistance of counsel and diminution of pay arguments," concluding that "the Senate alone determines procedures in this regard as in other matters raised in the complaint." Id. at 9.

C. Appellate Proceedings

Judge Hastings filed a notice of appeal from the district court's dismissal of his complaint on July 7, 1989. J.A. Exh. 2. On July 10 this Court denied Judge Hastings' emergency motion for injunctive relief pending appeal and for expedited consideration, because "[a]ppellant has not demonstrated the requisite likelihood of success on the merits to warrant either injunctive relief pending appeal or expedition." Order of July 10, 1989 (per curiam) (Ruth B. Ginsburg, Silberman, Sentelle, JJ.). On July 11, Judge Hastings applied to the Supreme Court of the United States for an injunction pending appeal. No. 19 (S.Ct.). Following Justice White's denial of the application, Judge Hastings requested that the application be submitted to Justice Brennan, who referred it to the Court. On August 11, the Court denied the application. 58 U.S.L.W. 3120 (U.S. Aug. 22, 1989).

D. The Continuation of Impeachment Proceedings

The Impeachment Trial Committee began its evidentiary proceedings on July 10, 1989. Following opening arguments by each side, the Committee heard approximately 70 hours of testimony over 18 days of trial. Throughout, Judge Hastings was assisted by counsel and the subpoena power of the Senate. The House elicited testimony from 26 witnesses, and Judge Hastings called 28 witnesses on his behalf.8/ Judge Hastings himself testified for more than 14 hours over three days. In the course of its proceedings, over 360 exhibits were admitted into evidence and made a part of the Committee's record. The Committee concluded its evidentiary proceedings on August 3.9/

8/ The Senate paid the expenses of summoning both sides' witnesses. The Committee supplemented the live testimony by accepting into its hearing record stipulations and prior testimony from the criminal trials and judicial investigatory proceedings that could appropriately be introduced.

9/ With the Senate's authorization, S. Res. 162, 101st Cong. 1st Sess. (1989), 135 Cong. Rec. S10013 (daily ed. Aug. 3, 1989), the Committee's hearing record remains open to receive the testimony of one witness, William A. Borders, Jr., whose (footnote continued)

The Committee is preparing a neutral summary report of contested and uncontested evidence to be transmitted to the full Senate along with the record of its proceedings. Following its printing by the Governmental Printing Office, the report is scheduled to be filed with the Senate and distributed to all Members during the third week of September. The parties will then submit written briefs to the full Senate, and the Senate will hear argument, deliberate, and vote on the articles of impeachment on the floor, probably in October.

SUMMARY OF ARGUMENT

Judge Hastings' complaint is not justiciable, because it inappropriately seeks equitable judicial intervention to control the Senate's proceedings in the performance of its constitutional responsibility to try his impeachment. The legislative immunity provided by the Speech or Debate Clause of the Constitution, the inappropriateness of the relief he seeks under the separation of powers, the constitutional commitment of impeachment trial power to the Senate, and the prematurity of the complaint under traditional ripeness principles all mandate the dismissal of Judge Hastings' complaint. Because identical principles bar the adjudication of Judge Nixon's

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refusal thus far to testify before the Committee has led to his being adjudged in civil contempt by the district court and to his present incarceration. Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings v. Borders, Misc. No. 89-129 (D.D.C. Aug. 22, 1989). Although no appeal was taken from that contempt order, Mr. Borders appealed from the earlier order of the district court immunizing him, and that appeal is currently pending. No. 89-5189 (D.C. Cir.).

complaint and in order to avoid unnecessary repetition, we have briefed these justiciability barriers to the maintenance of these suits extensively in our brief in No. 89-5191 and will rely on that discussion here. In that brief our summary of these arguments appears at pages 9 - 12 and the presentation of the arguments appears at pages 13 - 37.

We will also rely on our discussion in No. 89-5191 to demonstrate why the Senate's use of a committee to hear evidence in these impeachment proceedings is a reasonable and constitutional exercise of the Senate's responsibility to try these impeachments. There is no evidence supporting Judge Hastings' argument that the Framers of the Constitution intended to obligate the Senate to duplicate the procedures that would be used in a criminal trial, and there is ample precedent for the Senate's use of a committee to assist it in developing an evidentiary record for the trial of impeachments. Our argument supporting the use of a committee in these impeachments is summarized at page 12 of our brief in No. 89-5191 and is fully developed at pages 37 - 46.

We focus our argument in this brief on the challenges that Judge Hastings alone raises to his impeachment proceedings. First, we seek to show why the Double Jeopardy Clause does not apply to impeachment proceedings and, accordingly, why Judge Hastings' criminal acquittal on charges similar to some of the articles of impeachment does not bar his trial on those charges. Impeachment is a remedial, not a criminal or punitive, proceeding. The Framers deliberately separated impeachment from the criminal process by providing that conviction on impeachment would do no more than to secure the public against political injury by removing, and possibly, disqualifying misbehaving officers. In recognition that impeachment is a political process, the Framers vested impeachment power solely in the Legislative Branch. Applying double jeopardy to impeachment is inconsistent with that deliberate decision and with the separation of powers, because impeachment is intended to function as a legislative check on the Executive and Judicial Branches. Giving criminal proceedings binding, preclusive effect on subsequent impeachment proceedings, as applying double jeopardy would do for both criminal acquittals and criminal convictions, would weaken the role of impeachment as a legislative check on the misconduct of officials of the other branches.

Second, the Constitution does not require the Senate to pay the legal expenses incurred by Judge Hastings as a result of his impeachment trial. The Compensation Clause of the Constitution, which provides that the "Compensation" of judges "shall not be diminished," Art. III, sec. 1, does not apply to impeachment. The purpose of the Compensation Clause is to guarantee judicial independence by preventing the Legislative Branch from legislating salary reductions as an alternative to impeachment as a means of disciplining the Judiciary. The

Clause does not apply to impeachment, which is the constitutionally intended means of addressing judicial misconduct.

Finally, Judge Hastings' claim that the House delayed too long before impeaching him on the first fifteen impeachment articles does not state a claim of a due process or other constitutional violation. Neither criminal statutes of limitations nor the equitable doctrine of laches applies to impeachment, and there is ample precedent for intervals longer than that here. Judge Hastings' claim of delay is principally an attempt to renew his previously rejected claims about the constitutionality of his being tried criminally and investigated under the Judicial Conduct and Disability Act prior to his impeachment. Much of the delay of which he complains is attributable to his own litigation challenging those prior proceedings, and the prejudice that he alleges is attributable in significant part to his own decisions not to avail himself of the opportunities provided through participation in the judicial investigatory proceedings. The trial of the impeachment articles preferred by the House is fully consistent with the principles of fundamental fairness and due process.

ARGUMENT

I

JUDGE HASTINGS' COMPLAINT IS NOT JUSTICIABLE

The district court correctly held that Judge Hastings' complaint is not justiciable. There are four conceptually related barriers to justiciability. First, the Speech or

Debate Clause bars Judge Hastings' complaint against the Senate, the Impeachment Trial Committee, the Secretary of the Senate, and the Acting Public Printer to restrain their performance of their function of receiving evidence and transmitting that evidentiary record to Members of the Senate. Second, the separation of powers prevents a court from entering declaratory or injunctive relief, as requested by Judge Hastings, to interfere with the Senate's conduct of its proceedings.[10] Third, the Constitution's commitment to the Senate of the sole power to try impeachments renders the Senate's exercise of its impeachment trial power not subject to judicial review, especially in the midst of the Senate's trial proceedings. Finally, Judge Hastings' complaint is premature under traditional standards of ripeness, until the Senate has disposed of the articles of impeachment. Whichever of these doctrines is applied, the result is that Judge Hastings' present complaint cannot be adjudicated consistently with the proper relation between the Judicial and Legislative Branches. Because these justiciability barriers identically require the dismissal of Judges Hastings' and Nixon's complaints,[11] we will rely upon, and incorporate, here our discussion of these issues at pages 13 - 37 of our brief in No. 89-5191.

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[10] By the time that this case is argued, much of the relief requested by Judge Hastings, for declaratory and injunctive relief against the Committee, the Secretary, and the Public Printer, will have become moot, as each of these defendants will have completed its or his role in preparing and communicating to the Senate the Committee's evidentiary record for the Senate's consideration. Thus, the only defendant against whom this action retains any possible vitality is the Senate itself. The entry of declaratory or injunctive relief against the Senate's using the Committee's evidentiary record as the basis for its deliberations on the articles of impeachment raises the gravest concerns under the Speech or Debate Clause and the separation of powers.

II

JUDGE HASTINGS' COMPLAINT FAILS TO STATE A CLAIM FOR RELIEF

If a court were free to review the Senate's exercise of its constitutional authority to try the impeachment of Judge Hastings, the complaint's failure to state a meritorious claim nevertheless would require its dismissal. On appeal, Judge Hastings raises four constitutional objections to the Senate's proceedings against him: (1) that the Senate's appointment of a committee, pursuant to Impeachment Rule XI, to compile and to report to the Senate an evidentiary record on which to base its deliberations, contravenes the constitutional requirement that the Senate "try" impeachments, (2) that the constitutional bar against double jeopardy precludes his trial on impeachment on the bulk of the articles, (3) that the Committee's denial of his request for defense funds violates the Compensation Clause of the Constitution, and (4) that the elapsed time before his impeachment by the House deprives him of the opportunity for a fair trial.[12] We respond to the constitutional challenge to the Senate's use of a Rule XI committee at length in our brief in No. 89-5191 (at pages 37 - 46) and hereby incorporate that discussion.[13] Below we explain why none of Judge Hastings' other claims states a cognizable basis for relief.

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[11] Although the specific injunctive relief requested by the judges varies somewhat, compare J.A. Exh. 1, at 43-44 with Nix. App. at A-14, both requests are barred for identical reasons. Further, the constitutional claims raised by Judge Hastings alone -- double jeopardy, attorneys' fees, and undue delay -- are barred from adjudication in the context of the present complaint for the identical reasons as the Rule XI Committee claim that he and Judge Nixon both raise.

A. Double Jeopardy Does Not Apply to Impeachment Proceedings

The Double Jeopardy Clause, which states, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb," Amend. V, prohibits the government from "punishing twice, or attempting a second time to punish criminally, for the same offense." Helvering v. Mitchell, 303 U.S. 391, 399 (1938). Judge Hastings' contention that he cannot be tried on Impeachment Articles I through XV because he was acquitted on criminal charges substantially similar to the allegations in those articles fails, because the constitutional bar of double jeopardy does not apply to impeachment proceedings.[14]

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[12] On appeal Judge Hastings has not pursued his claims that trial on cumulative Article XVII and the Committee's rulings deprived him of a fair trial.

[13] The only manner in which Judge Hastings' claim differs from Judge Nixon's is that Judge Hastings also contends that, even if Rule XI is constitutional on its face, it is unconstitutional as applied to his impeachment trial, because he was acquitted of criminal charges. We rely on our demonstration below that double jeopardy does not apply to the impeachment process to show that the Senate's discretion to structure its impeachment trial procedures, including through the use of a committee to hear evidence, is not affected by the outcome of any prior criminal proceedings.

[14] The inapplicability of double jeopardy to impeachment renders Judge Hastings subject to trial on all of the House's (footnote continued)

The Double Jeopardy Clause has no applicability in this case, because impeachment is a remedial, not a criminal or punitive, proceeding. The Framers' purpose in conferring upon the Senate the power to try an officer on articles of impeachment and to remove him from office was not to inflict punishment, but to provide a means "for defending the Community." 2 M. Farrand, The Records of the Federal Convention of 1787, at 65 (rev. ed. 1966) (Madison). "[I]mpeachment ... is not so much designed to punish an offender as to secure the state against gross official misdemeanors. It touches neither his person nor his property, but simply divests him of his political capacity." 1 J. Story, Commentaries on the Constitution, § 803, at 586-87 (5th ed. 1905). As the district court

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charges without distinguishing among them. Nevertheless, it is important to note that the impeachment articles vary in their proximity to the charges on which Judge Hastings was tried criminally. For example, although Article I alleges participation in the conspiracy of which Judge Hastings was acquitted and Article II alleges that he testified falsely in denying his participation in the conspiracy, Article IX charges a discrete false statement on which the Senate could logically convict Judge Hastings consistently with the jury's and its own acquittal of him on the conspiracy charge. Compare J.A. Exh. 7, at 1-2 with id. at 7; see J.A. Exh. 3, at 9 ("Judge Hastings faces Articles of Impeachment charging false testimony, fabrication of false records and grossly improper disclosure of confidential law enforcement information, for which he was not previously tried.").

Further, the Senate has never established a standard of proof for impeachment trials, but has left it "for each Senator to decide individually when voting on Articles of Impeachment." 132 Cong. Rec. S15506 (daily ed. Oct. 7, 1986) (denying Judge Claiborne's motion to establish standard). Consequently, the existence of a reasonable doubt sufficient to free an official of criminal punishment may be insufficient to preclude the Senate from determining that the evidence justifies the official's removal from office.

observed, "impeachment is not a criminal proceeding;" rather, "[t]he Framers understood that impeachment trials were fundamentally political." J.A. Exh. 3, at 7.

Unlike the practice in England, where impeachment was viewed as a criminal process resulting in the imposition of criminal, including, capital, punishment, the Framers deliberately confined the consequences of impeachment "to a removal from and disqualification for office, thus limiting the punishment to such modes of redress as are peculiarly fit for a political tribunal to administer, and as will secure the public against political injuries." 1 J. Story, § 812, at 591.[15] The Supreme Court recently reaffirmed that the Double Jeopardy Clause does not apply to "a civil sanction that can[] fairly be said solely to serve a remedial purpose." United States v. Halper, 109 S.Ct. 1892, 1902 (1989).

The conclusion that double jeopardy does not apply to impeachment proceedings is confirmed by the Framers' determination to vest the impeachment process entirely in the Legislative Branch. Although the Framers originally planned to give the Supreme Court the power to try impeachments, after lengthy consideration the Convention transferred the forum for impeachment trials to the Senate. "A conclusive reason" for the transfer of authority to try impeachments from the Supreme

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[15] Similarly, the Framers limited the universe of individuals subject to impeachment to "[t]he President, Vicc President and all civil Officers of the United States," Art. II, sec. 4, while in England private individuals were impeachable.

Court to the Senate was the Framers' intention that impeachment operate independently from the criminal process, which would be under the superintendence of the Supreme Court. 2 M. Farrand 500 (Morris). Removal of responsibility for impeachment trials from the courts to the Senate enhanced the mutual independence of impeachment and the criminal process, reducing the possibility "that error, in the first sentence, would be the parent of error in the second sentence" and ensuring for "those who might happen to be the objects of prosecution ... the double security intended them by a double trial." The Federalist No. 65, at 428 (B. Wright ed. 1961).

Application of double jeopardy principles to impeachment is wholly inconsistent with the Framers' decision to separate impeachment from the criminal process and to provide accused officials with the "double security" of "a double trial" by different branches of the government. During the impeachment trial of Justice Samuel Chase, Luther Martin, who had been a delegate to the Convention and was representing Justice Chase, explained that double jeopardy does not apply to impeachment, because the Framers deliberately separated impeachment from the criminal process, so as not "to permit the tenure of [officers'] offices to depend upon the passions or prejudices of jurors." 14 Annals of Cong. 432 (1805). In the context of a prior acquittal on criminal charges, as in the present case, application of double jeopardy would effectively transfer the constitutional power over impeachment from the Legislative Branch to the Judiciary, in direct conflict with the Framers' express determination that "the Senate [is] the most fit depositary of this important trust." The Federalist No. 65, at 427.

Moreover, the application of double jeopardy to impeachment would have profound and disturbing implications for the separation of powers. The commitment of the impeachment power to "the two Houses as representatives of the people" was one of the most important "checks and balances" that the Convention wrote into the Constitution as "the foundation of a structure of government that would protect liberty." Bowsher v. Synar, 478 U.S. 714, 722 (1986). The Framers mandated "[a] direct congressional role in the removal of officers" through impeachment, id. at 723, because they believed that "the representatives of the nation themselves" were the only proper "inquisitors for the nation" in the "NATIONAL INQUEST" for "the conduct of public men" that they intended impeachment to be. The Federalist No. 65, at 427. They created the impeachment process, which covers the President, the Vice President, and other "civil Officers" of the Executive Branch, as well as judges, to serve as "a bridle in the hands of the legislative body upon the executive servants of the government." Id. Barring the impeachment of an officer of the Executive or Judicial Branch on account of the attachment of jeopardy in criminal proceedings initiated by the Executive Branch in the Judicial Branch would loosen the "bridle" of impeachment as a legislative check on the misconduct of officials of the other branches.

Because "'jeopardy attaches' when the trial commences," United States v. Jorn, 400 U.S. 470, 480 (1971) (plurality opinion), application of double jeopardy principles would function to bar an impeachment proceeding if a criminal trial had been commenced. Therefore, in order to preserve its ability to try an officer on impeachment, the Congress could be forced to rush to commence impeachment proceedings before jeopardy attached in criminal proceedings. Applying double jeopardy to impeachment would confer upon the Executive Branch the very power, by initiating criminal proceedings, to block impeachments that the Framers expressly withheld from the Executive when they gave the President "Power to grant Reprieves and Pardons for Offences Against the United States, except in Cases of Impeachment." Art. II, sec. 2 (emphasis added). "It is unthinkable that the executive branch could effectively prevent an impeachment by purporting to try a judge or that the judiciary could prevent an impeachment by accepting a plea." J.A. Exh. 3, at 9. The Constitution's conferral upon the Senate of "the sole Power to try all Impeachments" is wholly incompatible with potential divestment of the impeachment power by the other branches, which Judge Hastings' double jeopardy argument necessarily entails.

Further, where it applies, double jeopardy not only "protects against a second prosecution for the same offense after acquittal," but also "protects against a second prosecution for the same offense after conviction." North Carolina v. Pearce, 395 U.S. 711, 717 (1969).[16] Hence, if Judge Hastings' trial on impeachment for charges on which he was acquitted in his criminal trial is barred by double jeopardy, then impeachment on those charges would also be barred even if he had been convicted, because double jeopardy bars a second prosecution, regardless whether the first trial resulted in conviction or acquittal.[17] More generally, if double jeopardy applies to impeachment proceedings, then no federal official may be impeached and removed from office for committing "Treason, Bribery, or other high Crimes and Misdemeanors," Art. II, sec. 4, once he has been criminally convicted of such a crime.

Thus, if double jeopardy applies to impeachment, the Senate improperly removed Judge Claiborne from office in 1986 for income tax evasion,[18] and Judge Nixon, who is serving a prison sentence for perjury and whose impeachment proceedings are currently underway, cannot be tried on those charges. If former Vice President Spiro Agnew had not agreed to resign following his nolo contendre plea on criminal charges, Judge Hastings' view of double jeopardy necessarily implies that he could not have been impeached and removed from office. The Framers would indeed be astonished at the notion that, by pleading guilty to a criminal charge such as bribery or treason, the two impeachable offenses specifically set out in the Constitution, an officer could permanently insulate himself from removal for office for his misconduct.

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[16] Third, "the Double Jeopardy Clause protects against ... multiple punishments for the same offense. ... 'If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence.'" United States v. Halper, 109 S.Ct. at 1897 (quoting Ex parte Lange, 85 U.S. (18 Wall.) 163, 168 (1873)).

[17] Judge Hastings pleads the defense of "autrefois acquit" -- formerly acquitted. J.A. Exh. 1, at 29. If he had been convicted, he could as easily plead the reciprocal double jeopardy defense, "autrefois convict."

[18] In trying Judge Claiborne, the Senate rejected an effort by the House to have the Senate bound by the prior judgment of the Judicial Branch. The House suggested that the Senate could summarily remove Judge Claiborne from office, without receiving evidence, on the ground that Judge Claiborne had been convicted in the courts. Senator Mathias explained why a trial in the Senate was needed, notwithstanding Judge Claiborne's criminal conviction:
(footnote continued)

Judge Hastings misreads the Constitution when he points to asserted textual support for extending double jeopardy to impeachment. See Brief of Appellant at 36-40. There is no support for his position that Article I, section 3, clause 7

> The Senate has the "sole power to try all impeachments." We have no authority to delegate that responsibility to any other branch.
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> . . .
>
> If our obligation to try all impeachments results in the expenditure of our time and resources or creates the possibility that our conclusions may differ from those of the judiciary in exercising our separate constitutional responsibilities, that would be a result of the Framers' design and not of our personal wishes.

Report of the Senate Impeachment Trial Committee: Hearings Before the Senate Impeachment Trial Committee, 99th Cong., 2d Sess., Pt. 1, at 109 (1986). Although Judge Claiborne was convicted on three articles charging substantive misconduct, 132 Cong. Rec. S15760-62 (daily ed. Oct. 9, 1986), the Senate acquitted him on the article that sought to remove him based solely on the fact of his criminal conviction, id. at S15761.

was intended to set out the only circumstance in which an official could be tried on both impeachment and criminal charges when it states that "the Party convicted [on impeachment] shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." Judge Hastings previously failed to persuade the Eleventh Circuit that this clause "creates a constitutionally mandated sequence for the prosecution of a federal judge," thus serving to bar his criminal trial until after his removal from office by the Congress. United States v. Hastings, 681 F.2d 706, 710 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983).[19] No more does it create, as Judge Hastings now claims, the only exception from the application of double jeopardy to impeachment.

The purpose of the language is most clearly understood from the entire Clause:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

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[19] The court described the several instances before 1982 in which a federal judge had been criminally prosecuted. Id. at 709 n.7. Until Judge Claiborne's criminal conviction and subsequent impeachment and removal in 1986, no judge had been tried on impeachment following criminal charges. This statistic reflects only the fact that before 1986 the resignations of judges who had become the subject of criminal investigations or prosecutions made impeachment unnecessary. See id.; J. Borkin, The Corrupt Judge 27, 33, 116, 181 (1962).

Art. I, sec. 3, cl. 7. The portion of the Clause following the colon is most plausibly understood, in the context of the balance of the Clause, as a qualification clarifying the meaning of the limitation on the consequences of impeachment preceding the colon. That is, although the Framers prescribed that impeachment not result in criminal punishment, as it could in England, but be limited to removal and disqualification, they sought to eliminate any implication from that limitation that an impeached official would be rendered immune from criminal processes and to ensure that he would "still be liable to prosecution and punishment in the ordinary course of law." The Federalist No. 65, at 428. Thus, the final language of the Impeachment Trial Clause was logically added to confirm the availability of trial on criminal charges, not primarily against a possible claim of double jeopardy, but rather against the specific inference potentially created by the Clause's preceding language.

Judge Hastings also argues (at 40 n.60) that the text of the Double Jeopardy Clause adopted by the First Congress supports his position that double jeopardy applies to impeachment. Judge Hastings relies on the change from the initial draft of the Clause proposed by Madison, which stated, "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence," 1 Annals of Cong. 434 (J. Gales ed. 1834), to the text included in the Fifth Amendment, which does not include the reference to impeachment. He argues that this unexplained change evidences the First Congress's intent that double jeopardy apply to impeachment.

In the absence of any recorded explanation of the reasons for the substituted language,[20] the most plausible interpretation is that the Members of the First Congress viewed an explicit textual double jeopardy exception as unnecessary surplusage in light of their understanding of the independent and complementary nature of impeachment and the criminal process.[21] Representative Livermore's reference in House debate to Madison's proposed language as "declaratory of the law as it now stood," 1 Annals of Cong. 753, supports this inference of the First Congress's understanding that under the Constitution double jeopardy does not apply to impeachment. Thus, the district court correctly held, as the Senate had earlier determined, that "[i]mpeachment proceedings are not to be restricted by principles of double jeopardy...." J.A. Exh. 3, at 9.[22] The decision what, if any, weight should be given to Judge

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[20] The change was made in the Senate, see 2 B. Schwartz, The Bill of Rights: A Documentary History 1146, 1149 (1971), and debate was not recorded, id. at 1145.

[21] The Supreme Court's reliance in other interpretative questions on the initial formulation of the Double Jeopardy Clause as evidence of the meaning of the Clause manifests its apparent view that the textual alterations of the Clause were not intended to make substantive changes. See, e.g., United States v. Halper, 109 S.Ct. at 1897.

[22] Accord Hearings, supra note 2, at 348 (conclusion of 11th Circuit investigating committee that "double jeopardy principles are not applied to an impeachment proceeding").

Hastings' acquittal is a judgment for the Senators alone to make in voting on the articles. See J.A. Exh. 3, at 8 & n.5.

B. The Constitution Does Not Require the Senate To Pay Judge Hastings' Legal Costs in This Impeachment Trial

The Compensation Clause does not require the Senate to pay the attorneys' fees and other costs incurred by Judge Hastings in his defense of the articles of impeachment.[23] The Compensation Clause provides that judges "shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Art. III, sec. 1. The Compensation Clause was adopted to guarantee the independence of the Judiciary from its coordinate branches, because "[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. ... In the general course of human nature, a power over a man's subsistence amounts to a power over his will." The Federalist No. 79, at 497 (Hamilton) (emphasis omitted).[24]

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[23] The Senate has never paid an impeached officer's legal costs. The only previous request for attorneys' fees, Judge Swayne's request following his acquittal on all charges, 39 Cong. Rec. 3601 (1905), was not acted upon. Instead, the Senate paid only the expenses of bringing both sides' witnesses to Washington, as it traditionally has. See S. Doc. No. 1, 59th Cong., 1st Sess. 326-37 (1905). In the Hastings proceeding, the Senate paid approximately $25,000 for the expenses of both sides' witnesses.

[24] In Justice Story's words, "Without this provision, [the Compensation Clause] the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery." 2 J. Story, § 1628, at 439. As the Supreme Court has noted, "The relationship of judges' compensation to their independence (footnote continued)

The provision of life tenure during "good Behaviour," coupled with the promise of no diminution in compensation, guarantees judicial independence by rendering impeachment the only means, direct or indirect, by which the Legislative Branch may remove a judge from office. See Hastings v. Judicial Conference, 770 F.2d 1093, 1106 (D.C. Cir. 1985) (Edwards, J., concurring), cert. denied, 477 U.S. 904 (1986). The Framers based the constitutional plan on their determination that establishing impeachment as the only "precaution[] for [judges'] responsibility ... is consistent with the necessary independence of the judicial character." The Federalist No. 79, at 498. Judge Hastings' attempt to apply the Compensation Clause to the impeachment process is wholly inconsistent with the Clause's purpose, which was to establish impeachment as the only method of judicial accountability to any other branch, not to constrain or condition the impeachment process. To contend, as Judge Hastings does, that subjecting a judge to the impeachment process, as provided for by the Constitution, "diminishes" his "Compensation" utterly distorts the meaning of the prohibition and "trivialize[s] the great historic experience on which the framers based the safeguards of Article III, § 1." O'Malley v. Woodrough, 307 U.S. 277, 282

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was by no means a new idea initiated by the authors of the Constitution. ... Indeed, the Declaration of Independence, in listing the grievances against the King, complained: 'He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.'" United States v. Will, 449 U.S. 200, 218-19 (1980).

(1939). Maintaining that impeachment by the House diminishes his compensation makes no more sense than the argument, if he were to be convicted by the Senate, that his removal from office diminishes his salary.

The purpose of the Compensation Clause was to avoid "improper dependence in the Judges," 2 M. Farrand 44 (Morris), and hence the Clause is simply not implicated in an impeachment, which is the constitutional mechanism through which judges "properly" are rendered "dependent." In Justice Story's words,

> [A]lthough the Constitution has ... endeavored to guard the judicial department from the overwhelming influence or power of the other coordinate departments of the government, it has not conferred upon them any inviolability or irresponsibility for an abuse of their authority. On the contrary, for any corrupt violation or omission of the high trusts confided to the judges, they are liable to be impeached ... and, upon conviction, removed from office.

2 J. Story, § 1635, at 445.[25]

The difference between judicial independence and judicial immunity for purposes of the Compensation Clause was articulated by James Wilson: "In their salaries, and in their offices, they [judges] ought to be completely independent: in other words, they should be removed from the most distant apprehension of being affected, in their judicial character and capacity, by any thing, except their own behaviour and its consequences." J. Wilson, Government, Lectures on Law, reprinted in 4 The Founders' Constitution 162 (P. Kurland & R. Lerner eds. 1987) (emphasis added). The Compensation Clause does not apply to impeachment, because, as the district court held in rejecting Judge Hastings' Compensation Clause claim during earlier litigation over the judicial disciplinary proceedings, the Clause does not protect "[a]n indirect diminution of a judge's disposable income, triggered by that judge's own conduct." Hastings v. Judicial Conference, 593 F. Supp. 1371, 1384 (D.D.C. 1984) (per Gesell, J.), aff'd in part and vacated in part, 770 F.2d 1093 (D.C. Cir. 1985), cert. denied, 477 U.S. 904 (1986).[26/]

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[25] The fact that Judge Hastings' impeachment followed an investigation under the Judicial Conduct and Disability Act does not alter the inapplicability of the Compensation Clause to Judge Hastings' impeachment trial. Regardless of whether the Clause might require the payment of legal fees in that statutory process, see, e.g., Hastings v. Judicial Conference, 770 F.2d at 1110-11 (Edwards, J., concurring), the Clause does not apply to the intended constitutional process of impeachment. The House has held hearings on a bill to authorize the reimbursement of attorneys' fees and costs incurred in defending against a Judicial Conduct Act complaint that has been dismissed. H.R. 1620, 101st Cong., 1st Sess. § 101(g) (1989).

Because use of the constitutionally prescribed mechanism to try a judge for alleged high Crimes and Misdemeanors is by no stretch of the imagination a "direct, discriminatory assault on judical independence," Duplantier v. United States, 606 F.2d 654, 669 (5th Cir. 1979), or "an assault upon the independence

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[26/] On appeal, this Court held Judge Hastings' challenge premature. 770 F.2d at 1103. In a subsequent appeal, the Court held "that Judge Hastings ha[d] failed to exhaust the administrative remedies available to him with respect to his Compensation Clause claim." Hastings v. Judicial Conference, 829 F.2d at 103.

of the third branch or any of its members, [it] fall[s] outside the protection of the Compensation Clause." Atkins v. United States, 556 F.2d 1028, 1045 (Ct.Cl. 1977), cert. denied, 434 U.S. 1009 (1978).[27]

The Impeachment Trial Committee advised Judge Hastings that he "may renew his request for defense funds at the close of the Senate's proceedings on the Articles of Impeachment." 135 Cong. Rec. S6451 (daily ed. June 9, 1989), Def. App. 789. As the district court held, "the Senate alone determines procedures in this regard," J.A. Exh. 3, at 9, and there is no basis for judicial intervention in the Senate's pretrial determination not to provide funds.

C. The Interval Between Judge Hastings' Criminal Proceedings and His Impeachment Does Not Bar His Trial on Impeachment Charges

There is no authority supporting Judge Hastings' contention that the period of six to seven years that has elapsed since the occurrence of the conduct alleged in the first fifteen impeachment articles bars Judge Hastings' trial on these charges. Statutory limitations on federal criminal prosecutions have never been applied, and have no applicability, to the remedial constitutional process of impeachment. A number of impeachment trials have occurred more than five years after the acts on which they were predicated.[28] The equitable doctrine of laches is also inapplicable to remedial proceedings brought by the United States to vindicate the public interest. See Guaranty Trust Co. v. United States, 304 U.S. 126, 132 (1938).

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[27] Judge Hastings has not raised on appeal his claim below that the Sixth Amendment requires reimbursement for his legal expenses. The Sixth Amendment applies "[i]n all criminal prosecutions," and an impeachment trial is not a criminal proceeding that threatens "life or liberty." Johnson v. Zerbst, 304 U.S. 458, 463 (1938). Further, even if the Sixth Amendment did apply to impeachment proceedings, it would not obligate the Senate to fund Judge Hastings' expenses. The constitutional guarantee is one of effective assistance of counsel. As the record of the Committee's pretrial and trial proceedings manifests, Judge Hastings enjoys the effective assistance of able counsel. Even in criminal cases, the Constitution does not require the government to fund the defense of a defendant who has been able to obtain counsel to assist him effectively at his trial, as Judge Hastings has. See Atilus v. United States, 406 F.2d 694, 696 (5th Cir. 1969).

Judge Hastings' delay claim is principally another attempt to renew his challenge to the constitutionality of the Judicial Conduct and Disability Act. See Brief of Appellant at 49-50. Both the Eleventh Circuit and this Court have rejected Judge Hastings' argument that the House's deferring to the Judiciary for advice on whether to institute impeachment proceedings prejudiced his constitutional rights, In the Matter of Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit, 783 F.2d 1488, 1510-12 (11th Cir.), cert. denied, 477 U.S. 904 (1986); Hastings v. Judicial Conference, 829 F.2d at 98-103; In re Request for Access to Grand Jury Materials, Grand Jury No. 81-1, Miami (Hastings), 833 F.2d 1438, 1442-45 (11th Cir.

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[28] See, e.g., 39 Cong. Rec. 1282, 2229 (1905) (Judge Swayne; 12 years); 80 Cong. Rec. 3486-88, 4972 (1936) (Judge Ritter; 7 years); 132 Cong. Rec. 19495 (1986); S. Rep. No. 511, 99th Cong., 2d Sess. 3 (1986) (Judge Claiborne; 6 years).

1987), and that question is not open to further litigation. In fact, a substantial portion of the "delay" of which Judge Hastings complains is attributable to his many previous rounds of litigation in this Court and others to delay or to stop the criminal, investigatory, and impeachment proceedings.[29] Further, Judge Hastings' complaint that he has been the victim "of one-sided investigations" and that "relevant records have now been destroyed" (Brief of Appellant at 47), if true, could have been ameliorated by his participation in the judicial investigatory proceedings and use of the opportunity given him to subpoena witnesses and document production, which he chose not to do.[30] Requiring Judge Hastings to stand trial on the impeachment charges is fully consistent with standards of fundamental fairness and requirements of due process.

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[29] See Hastings v. Judicial Conference, 829 F.2d at 93 n.4 (collecting citations to previous litigation); In re Grand Jury Proceedings, 841 F.2d 1048, 1049 (11th Cir.) (additional litigation), stay denied, 108 S.Ct. 1461 (1988).

[30] See Hearings, supra note 2, at 6-8. As to the death of "crucial witnesses ... who appeared at the Judge's trial in 1983," Brief of Appellant at 47, the Committee accepted into its hearing record the prior trial testimony of both deceased witnesses for whom Judge Hastings requested the admission of prior testimony.

CONCLUSION

The Court should affirm the district court's order dismissing Judge Hastings' complaint.

Respectfully submitted,

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Dated: September 11, 1989

[SCHEDULED TO BE ARGUED ON OCTOBER 17, 1989]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5191

WALTER L. NIXON, JR.

Appellant,

v.

THE UNITED STATES SENATE, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF OF APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici.

All parties, intervenors, and amici appearing below and in this Court are listed in the Brief of Appellant.

(B) Ruling Under Review.

The ruling under review, Hastings v. United States Senate, C.A. No. 89-1602 (D.D.C. July 5, 1989) (Gesell, J.), is unreported and appears as Appendix 3 to Brief of Appellant ("App. 3 to Nixon Br.").

(C) Related Cases.

This case was previously before this Court on appellant's emergency motion for acceleration of briefing and oral argument, which the Court denied initially, Order of July 12, 1989 (per curiam) (Ruth B. Ginsburg, Silberman, JJ.), and on renewal, Order of July 18, 1989 (per curiam) (Ruth B. Ginsburg, Silberman, JJ.).

Hastings v. United States Senate, No. 89-5188 (D.C. Cir.), is a related case presenting some of the same issues and involving the same defendants.

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No. 89-5191

IN THE UNITED STATES COURT OF APPEALS
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Appellant,

v.

THE UNITED STATES SENATE, *et al*.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLEES

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court correctly ruled that Judge Nixon's complaint seeking judicial intervention in the Senate's performance of its impeachment trial function is non-justiciable under the Speech or Debate Clause and the separation of powers.

2. Whether, as the district court alternatively found, Judge Nixon's objection to the Senate's use of a committee to hear evidence in his impeachment proceeding fails to state a claim of a constitutional violation.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

Pertinent constitutional provisions and Senate rules are set forth in a separately bound addendum.

COUNTER STATEMENT OF THE CASE

This appeal concerns the impeachment trial of Chief Judge Walter L. Nixon, Jr., of the Southern District of Mississippi, which is currently in progress in the United States Senate. Judge Nixon intervened in a similar action commenced by District Judge Alcee L. Hastings to challenge his impeachment trial, and applied for preliminary injunctive relief halting his impeachment trial in the Senate. Judge Nixon appeals from the district court's decision denying his application for interim injunctive relief and dismissing his complaint.

A. The Commencement of Impeachment Proceedings

Judge Nixon was indicted in 1985 on one count of receipt of an unlawful gratuity and three counts of perjury before a grand jury that was investigating allegations of official corruption in the Southern District of Mississippi. After a jury trial, Judge Nixon was acquitted on the gratuity charge and on one perjury count, but was convicted on the two other perjury charges. The court of appeals upheld Judge Nixon's conviction, United States v. Nixon, 816 F.2d 1022 (5th Cir. 1987), and the Supreme Court denied certiorari, 108 S.Ct. 749 (1988). On March 23, 1988 Judge Nixon began serving a prison sentence of five years on each count, to be served concurrently. He is currently incarcerated.[1]

On February 11, 1988, based on the criminal conviction and without independent investigation, the Judicial Council of the Fifth Circuit certified to the Judicial Conference that Judge Nixon had engaged in conduct which might constitute grounds for impeachment. On March 15, 1988 the Judicial Conference concurred in that determination and certified to the House of Representatives that consideration of impeachment may be warranted.

The House of Representatives impeached Judge Nixon of high crimes and misdemeanors on May 10, 1989. H. Res. 87, 101st Cong., 1st Sess. (1989); Deferred Appendix of Appellant ("Nix. App.") A-16 - A-22. Impeachment Articles I and II charged Judge Nixon with having testified falsely before the grand jury, and Article III charged him with having brought disrepute on the Judiciary by making numerous false statements both to the grand jury and to the government prosecutor and investigating agent. The House exhibited the articles of impeachment to the Senate on May 11, 1989. 135 Cong. Rec. S5132-33 (daily ed.).[2]

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[1] Last month, the Fifth Circuit affirmed the decision of the district court, after an evidentiary hearing, denying Judge Nixon's petition to vacate his conviction and grant a new trial. Nixon v. United States, 703 F. Supp. 538 (S.D. Miss. 1988), aff'd, No. 89-4127 (5th Cir. Aug. 17, 1989)(1989 WL 91546).

After the oath was administered to the senators, id. at S5133, Def. App. 10, the Senate authorized the appointment of a committee pursuant to Senate Impeachment Rule XI, as it had in the impeachment proceedings involving Judge Hastings, to compile an evidentiary record for transmittal to the full Senate. S. Res. 128, 101st Cong., 1st Sess. (1989), 135 Cong. Rec. S5133-34 (daily ed. May 11, 1989), Def. App. 10-11. Rule XI provides for the appointment of a committee of twelve members

> to receive evidence and take testimony at such times and places as the committee may determine [and to] ... report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee.... [S]uch report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

Provisions Addendum to this Brief ("Prov. Add.") at A-5. Pursuant to Senate Resolution 127, 101st Cong., 1st Sess. (1989), 135 Cong. Rec. S5133 (daily ed. May 11, 1989), Def. App. 10, Judge Nixon filed an answer to the articles on May 31,

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[2] Defendants' Appendix in Opposition to Intervenor's Motion for Preliminary Injunction: Record of Senate Proceedings in the Impeachment of Judge Walter L. Nixon, Jr. ("Def. App.") 9-10.

1989, 135 Cong. Rec. S5788-89 (daily ed.), Def. App. 71-79, and the House filed a replication on June 12, 1989, 135 Cong. Rec. S6572-73 (daily ed. June 13, 1989), Def. App. 94-101.

B. Proceedings in the District Court

Judge Nixon intervened in this action by Judge Hastings on June 14, 1989. Nix. App. A-3. Judge Nixon's complaint-in-intervention named as defendants the identical defendants sued by Judge Hastings, including the committee appointed to compile Judge Hastings' trial record, rather than the committee appointed for his own impeachment. Nix. App. A-6 - A-8. He alleged that the appointment of a Rule XI committee in his impeachment trial violated Article I, section 3, clause 6, which provides that "[t]he Senate shall have the sole Power to try all Impeachments," Nix. App. A-11 - A-12, and sought a declaratory judgment that the use of a committee was unconstitutional. Nix. App. A-12. Despite the fact that his complaint sought no injunctive relief, see Nix. App. A-1, A-12, Judge Nixon simultaneously moved for a preliminary injunction that "[t]he defendants shall take no action to deny Nixon a trial before the full Senate on the pending Articles of Impeachment against him, pending final judgment on Nixon's claim for declaratory judgment." Nix. App. A-19.

Defendants crossed Judge Nixon's preliminary injunction motion with a motion to dismiss his complaint under Rule 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure. Nix. App. A-25 - A-26. Defendants maintained that (1) the separation of powers and the Speech or Debate Clause barred the court's assertion of jurisdiction over the defendants as Judge Nixon requested, (2) the constitutional commitment to the Senate of the power to try impeachments rendered his complaint nonjusticiable, and (3) his complaint failed to state a claim of a constitutional violation upon which relief could be granted. Nix App. A-25 - A-26. Defendants moved on similar grounds to dismiss Judge Hastings' complaint, which presented the same claim, as well as additional claims.

Following briefing and argument, on July 5, 1989 the district court denied both judges' motions for preliminary injunctions and granted defendants' motions to dismiss the complaints. App. 3 to Brief of Appellant ("Nixon Br.") Beginning with the challenges to the use of committees, Judge Gesell stated that "[i]nsofar as Judges Hastings and Nixon contend that they each have an individual right to an impeachment tried before the full Senate and that a federal district court may supervise the Senate's procedures for impeachment, they are mistaken." Id. at 4. Judge Gesell held that "[i]t is crystal clear that impeachment proceedings are wholly committed to Congress under the Constitution. Thus a classic political question is presented.... Absent evidence that the Senate is violating the Constitution, the Court should stay its hand." Id. After reviewing the historical use of committees in impeachment proceedings, the court stated,

> It is not this Court's function to tinker with the Senate's procedures or to anticipate

> problems that could arise. The procedures adopted do not by their terms violate any constitutional rights or offend fundamental notions of justice. The Senate's interpretation of what type of trial Article I, Section 3 requires is entitled to deference, absent a clear Constitutional violation.

Id. at 5. Describing the relief sought in the complaints as "utterly foreign to our system of divided powers," the court "refuse[d] to second-guess the Senate's impeachment proceedings." Id. at 6-7.

Judge Gesell also held that the complaints "raise troubling Speech and Debate clause issues." Id. at 10. The court found that the Clause "fully protected" the impeachment trial activities of both Senators and the Secretary of the Senate and the Acting Public Printer, whose "functions in this matter are to assist the Senators in conducting the hearings and disseminating the transcripts and committee report to Senators not on the committee." Id. The court concluded that "[a]ny order issued by the Court restraining the functions of these defendants not protected by the Speech and Debate Clause would have no effect." Id. In sum, Judge Gesell found that Judges Hastings and Nixon had "no possibility of success on the merits, all equities favor the Senate, and the public interest will be served by permitting the impeachment trial of Judge Hastings to proceed as contemplated by the Senate." Id. at 11. Accordingly, the court dismissed the complaints: "Due to the political question raised, for prudential reasons, and in recognition of the Speech and Debate Clause, the Court finds the case non-justiciable and it declines to become involved in monitoring the Senate's constitutionally-assigned proceedings." Id.

C. Appellate Proceedings

Judge Nixon filed a notice of appeal on July 10. On July 12, the Court denied Judge Nixon's emergency motion for acceleration of briefing and oral argument, because "[a]ppellant has not demonstrated that expedition is warranted in this case." Order of July 12, 1989 (per curiam) (Ruth B. Ginsburg, Silberman, JJ.). On July 18 the Court denied Judge Nixon's renewed emergency motion for accelerated briefing and argument. Order of July 18, 1989 (per curiam) (Ruth B. Ginsburg, Silberman, JJ.).

D. The Continuation of Impeachment Proceedings

The Nixon Impeachment Trial Committee ruled on several pretrial motions before commencing its evidentiary proceedings. The Committee denied for lack of jurisdiction Judge Nixon's request for reconsideration of the Senate's decision to appoint a Rule XI committee to compile the evidentiary record in the impeachment proceeding. Noting that Rule XI preserves the Senate's right to call for witnesses and hear testimony, or to have the entire trial, in open Senate, the Committee affirmed Judge Nixon's right to renew his motion for a live evidentiary proceeding before the full Senate, following the Committee's report of its evidentiary record to the Senate. See 135 Cong. Rec. S10675 (daily ed. Sept. 6, 1989)(Sen. Fowler).

In accord with prior determinations, the Committee also denied Judge Nixon's motions to reimburse him for the cost of his defense, id., and to dismiss the third impeachment article for failure to state an impeachable offense, id. at S10674. The Committee advised Judge Nixon that he is free to renew these motions before the full Senate after the conclusion of the Committee's proceedings or, in the case of the funds request, following the Senate's disposition of the articles of impeachment. Id. at S10674-75.

The Nixon Impeachment Trial Committee began its evidentiary proceedings on September 7. The Committee expects its proceedings to conclude on or about September 15. Following the Committee's submission of a neutral summary of the evidence and the record of its proceedings to the full Senate, and the parties' submission of briefs to the Senate, the Senate will take up the articles of impeachment against Judge Nixon, most likely sometime in October, after the completion of the Hastings impeachment trial.

SUMMARY OF ARGUMENT

The district court properly dimissed Judge Nixon's request for judicial intervention in the Senate's conduct of his impeachment trial for nonjusticiability. The threshold obstacle to adjudication of Judge Nixon's complaint is the Speech or Debate Clause, Art. I, sec. 6, cl. 1, of the Constitution, which provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." The Clause absolutely bars Judge Nixon's attempt through this civil action to "question" Members of the Senate "in any other Place" about their performance of the constitutional function of conducting his impeachment trial. Judge Nixon's naming as defendants the Secretary of the Senate and the Acting Public Printer of the United States, in addition to the Senate and the Impeachment Trial Committee, is ineffective to defeat the absolute bar of the Speech or Debate Clause, because he is seeking to interfere with the Senate's internal proceedings in the performance of a constitutional function. His lawsuit cannot be maintained against any Legislative Branch defendants consistently with the absolute immunity from judicial interference that the Clause provides for activities within the legitimate legislative sphere.

Beyond the specific textual bar of the Speech or Debate Clause, dismissal of Judge Nixon's complaint is mandated by the separation of powers, which precludes the entry of the relief that Judge Nixon seeks. Judge Nixon's complaint for declaratory and injunctive relief, in the midst of the Senate's conduct of his impeachment proceedings, restraining the continuation of the proceedings of a coordinate branch, requests an unprecedented application of equitable powers against the Senate's conduct of its legislative business, which is beyond the proper bounds of judicial power.

The third justiciability bar to this action is imposed by the Constitution's vesting in the Senate of "the sole Power to try all Impeachments," Art. I, sec. 3, cl. 6, which constitutes a "textually demonstrable constitutional commitment of the issue to a coordinate political department." Baker v. Carr, 369 U.S. 186, 217 (1962). As the Court of Claims held more than fifty years ago in rejecting a request for judicial review of an impeachment decision, "the word 'sole' was used ... with the intention that no other tribunal should have any jurisdiction of the cases tried under the provisions with reference to impeachment." Ritter v. United States, 84 Ct.Cl. 293, 296 (1936), cert. denied, 300 U.S. 668 (1937). The lack of judicial power to review the Senate's exercise of its impeachment trial power is confirmed by the Framers' determination to vest the power to try impeachments in the Senate, rather than the Supreme Court. The Framers understood that impeachment is fundamentally a political process and intended to separate the courts' responsibility for criminal matters from the political duty to try impeachments. Accordingly, the Constitution commits to the Senate sole power to structure its impeachment trial procedures, as well as to dispose of impeachment charges brought by the House. At a minimum, and as the record of judicial challenges to impeachment matters shows, the textual commitment of trial responsibility to the Senate bars judicial intervention in the Senate's trial before the Senate has completed its trial proceedings.

Finally, apart from these special barriers to judicial review imposed by the defendants, the relief, and the constitutional context of this complaint, this suit for anticipatory judicial review of the Senate's actions is barred under traditional standards of ripeness. Until the Senate rules finally on any motion by Judge Nixon for evidentiary proceedings on the floor and disposes of the impeachment articles, his complaint is premature and his injury speculative and contingent. Whether viewed independently or in combination, these several principles, which are informed by respect for the proper relationship between the Judicial and Legislative Branches, compel the dismissal of Judge Nixon's complaint as nonjusticiable.

If the Court were to reach the merits of Judge Nixon's challenge to the Senate's use of a committee to hear evidence in his impeachment trial, it should nevertheless affirm the dismissal of his complaint, because the use of a committee is a constitutional exercise of the Senate's power to try impeachments. There is no historical support for Judge Nixon's view that the Framers intended to obligate the Senate to replicate the procedures of a criminal trial in impeachment. To the contrary, the use of committees by the House of Lords in impeachment trials, by the Congress in disciplining, expelling, and judging the elections and qualifications of its Members, and of masters by the courts, provides firm historical support for the Senate's use of committees to hear evidence in impeachment trials. Under the Senate's practice, the full Senate remains the sole trier of fact and the sole judge of the law, consistently with the Framers' intent to vest the final impeachment trial responsibility in the Senate.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY HELD THAT JUDGE NIXON'S COMPLAINT IS NOT JUSTICIABLE

The Court should affirm the district court's judgment dismissing Judge Nixon's complaint because the complaint is not justiciable. Several distinct, but related, legal doctrines and principles establish the nonjusticiability of Judge Nixon's claim for relief. We discuss in turn (1) the Speech or Debate Clause, (2) the inappropriateness of the relief sought under the separation of powers, (3) the nonreviewability of the Senate's exercise of its impeachment trial power, and (4) the prematurity of Judge Nixon's complaint. Whether considered independently, or, as the district court did, in combination, these bases for dismissal all draw their strength from the central principle that proper respect for the separate roles of the Judicial and Legislative Branches renders the present complaint unsuitable for judicial resolution.

A. The Absolute Bar of the Speech or Debate Clause Compels the Dismissal of Judge Nixon's Complaint

The threshold basis for affirmance is the Speech or Debate Clause of the Constitution.[3] The Clause provides that

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[3] This Court properly considers Speech or Debate Clause defenses at the outset, see, e.g., Browning v. Clerk, U.S. House of Representatives, 789 F.2d 923, 926 n.7 (D.C. Cir.), cert. denied, 479 U.S. 996 (1986), because "the clause seeks to protect legislators 'not only from the consequences of litigation's results, but also from the burden of defending themselves.'" Id. at 927 (quoting Dombrowski v. Eastland, 387 U.S. 82, 85 (1967)); cf. Eastland v. United States Servicemen's (footnote continued)

"for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." Art. I, sec. 6, cl. 1. The Supreme Court has read the Clause "broadly to effectuate its purposes," United States v. Johnson, 383 U.S. 169, 180 (1966), which are "to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions," Powell v. McCormack, 395 U.S. 486, 505 (1969).

The Supreme Court has established that the Speech or Debate Clause applies in civil actions, because "[p]rivate civil actions also may be used to delay and disrupt the legislative function.... [L]egislative independence is imperiled." Eastland v. United States Servicemen's Fund, 421 U.S. at 503. The fact that Judge Nixon sought declaratory, as well as injunctive, relief[4] does not diminish the protection that the Speech or Debate Clause affords against his complaint. The Court has established that common-law legislative immunity,

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Fund, 421 U.S. 491, 511 n.17 (1975) ("such motions [to dismiss based on the Speech or Debate Clause must] be given the most expeditious treatment by district courts because one branch of Government is being asked to halt the functions of a coordinate branch. If there is a dismissal and an appeal, courts of appeals have a duty to see that the litigation is swiftly resolved"). The district court held that the Speech or Debate Clause was one of several applicable justiciability barriers. App. 3 to Nixon Br. at 11.

[4] Judge Nixon's complaint requested only declaratory relief, but he simultaneously moved for a preliminary injunction that "[t]he defendants shall take no action to deny Nixon a trial before the full Senate on the pending Articles of Impeachment against him, pending final judgment on Nixon's claim for declaratory judgment." Compare Nix. App. at A-12 with id. at A-14.

like that provided by the Clause, "is equally applicable to ... actions seeking declaratory or injunctive relief." Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719, 732 & n.10 (1980).

The Clause covers matters that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." Gravel v. United States, 408 U.S. 606, 625 (1972). Impeachment is assuredly covered by the Clause because "it is one of the 'other matters which the Constitution places within the jurisdiction of either House.'" In re Request for Access to Grand Jury Materials, Grand Jury No. 81-1, Miami (Hastings), 833 F.2d 1438, 1446 (11th Cir. 1987) (quoting Gravel).[5]

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[5] The district court's holding that the Clause "protect[s] the legitimate activities of Senators acting within their constitutionally prescribed functions, including ... impeachment," App. 3 to Nixon Br. at 10, mirrored its earlier ruling during Judge Claiborne's impeachment trial that "impeachment surely is" a "matter[] which the Constitution places within the jurisdiction of either House" and the Speech or Debate Clause was therefore a "fundamental obstacle to plaintiff's request" for judicial interference. Transcript of Hearing on Motion for Temporary Restraining Order at 3, Claiborne v. United States Senate, C.A. No. 86-2780 (D.D.C. Oct. 8, 1986) [hereinafter TRO Transcript] (per Greene, J.) (Decisions Addendum to this Brief ("Dec. Add.") at A-36), appeal dismissed for lack of prosecution, No. 86-5622 (D.C. Cir. Order of Mar. 23, 1987) (per curiam); cf. Memorandum at 2-3, Williams v. Bush, C.A. No. 81-2839 (D.D.C. Feb. 3, 1982) (per Oberdorfer, J.) (Speech or Debate Clause bars injunctive action against Senate's exercise of constitutional authority to expel its Members) (Dec. Add. at A-31 - A-32).

The Speech or Debate Clause bars this action to control the way in which Members of the Senate conduct this impeachment trial, because "once it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate clause is an absolute bar to interference." Eastland, 421 U.S. at 503 (quoting Doe v. McMillan, 412 U.S. 306, 314 (1973)). Accordingly, "the Speech and Debate Clause prevents [the courts] from questioning Congress about actions taken in the impeachment process," In re Request for Access to Grand Jury Materials, 833 F.2d at 1446, and requires the dismissal of Judge Nixon's complaint.

As the district court stated, Judge Nixon "sought to obviate the clear requirements of the Constitution by naming the Secretary of the Senate and the Acting Public Printer," App. 3 to Nixon Br. at 10, as well as the Senate and the Impeachment Trial Committee, as defendants.[6] That is, recognizing that the Senate and its Committee, which are nothing more than groups of Members, are protected from suit under the Speech or Debate Clause,[7] Judge Nixon sought to defeat the bar of legislative privilege by suing legislative employees. The district court correctly rejected this effort to circumvent the constitutional protection afforded the Congress in performing its legislative functions, because the action sought to enjoin the employees' performance of "internal functions," such as "assist[ing] the Senators in conducting the hearings and disseminating the transcripts and committee report to Senators not on the committee," which "are fully protected by the Speech and Debate Clause." App. 3 to Nixon Br. at 10.

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[6] Judge Nixon surprisingly joined Judge Hastings in suing the Hastings Impeachment Trial Committee, rather than the separate committee (there is no overlap between the two committees' members) that the Senate established to handle his matter. We do not know what relief Judge Nixon could possibly seek from the Hastings Committee or why he sued it, but for whatever reason he chose not to sue the Nixon Impeachment Trial Committee.

[7] See Eastland, 421 U.S. at 501 (Senate subcommittee immune from suit under Speech or Debate Clause); Keener v. The Congress of The United States, 467 F.2d 952, 953 (5th Cir. 1972) (per curiam) (Congress immune from suit under sovereign immunity). (footnote continued)

The district court's application of Speech or Debate Clause protection to the Secretary of the Senate and the Acting Public Printer respected the Supreme Court's holding that, "to the extent that [officials like the Public Printer] serve legislative functions, the performance of which would be immune conduct if done by Congressmen, these officials enjoy the pro-

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Judge Nixon disputes the district court's conclusion "that 'the Senate as an entity cannot be effectively sued,'" Nixon Br. at 24 n.4 (quoting App. 3 to Nixon Br. at 2), on the authority of Moore v. U.S. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985). In Moore this Court exercised its remedial discretion to dismiss an action filed against the House, the Senate, and other defendants under the Origination Clause of the Constitution. Moore does not, as Judge Nixon contends, "suggest[] that Nixon can sue the United States Senate," Nixon Br. at 24 n.4; the Court stated explicitly that it was not holding that the Houses of Congress may be sued under the Speech or Debate Clause. See 733 F.2d at 954 n.39 ("Because we affirm dismissal of the appellants' claim at the threshold of litigation, we have relieved appellants of the burden of defending themselves on the merits of the case. We need not, therefore, inquire into the extent of constitutional immunity from suit afforded by the Speech or Debate Clause."). Hence, Moore in no way alters the firm conclusion that neither the Senate nor its committees may be sued under the Speech or Debate Clause.

tection of the Speech or Debate Clause." Doe, 412 U.S. at 320. The Court specifically held in Doe that the Clause protects the Public Printer's "distribut[ion]" of "a published report ... used for legislative purposes by Members of Congress, congressional committees, and institutional or individual legislative functionaries." Doe, 412 U.S. at 312.[8] Thus, the Speech or Debate Clause bars Judge Nixon's effort to restrain legislative employees from assisting the Committee in fulfilling its duty to "report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee." Prov. Add. at A-5.[9]

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[8] Although the Court held that distribution outside of the Congress might be actionable, all Justices joined the "holding that the respondent Members of Congress and their committee aides and employees are immune under the Speech or Debate Clause for preparation of the Committee report for distribution within the halls of Congress." Id. at 338-39 (Rehnquist, J., concurring in part and dissenting in part); accord Gregg v. Barrett, 594 F. Supp. 108, 112 n.4 (D.D.C. 1984) ("Speech or Debate Clause ... bars granting injunctive relief against the Acting Public Printer" for circulating congressional documents to Members of Congress) (citing Doe), aff'd on other grounds, 771 F.2d 539 (D.C. Cir. 1985).

Judge Nixon's reliance (Nixon Br. at 25-26) on Walker v. Jones, 733 F.2d 923 (D.C. Cir.), cert. denied, 469 U.S. 1036 (1984), is misplaced. This Court's citation in Walker to Gravel and Doe manifests the Court's understanding that legislative employees share Members' Speech or Debate immunity when assisting them in performing legislative duties "'such as voting and committee reports and proceedings.'" 733 F.2d at 931 (quoting Gravel, 406 U.S. at 620).

[9] Moreover, by the time that this case is argued, much of the relief requested by Judge Nixon, for declaratory and injunctive relief against the Committee, the Secretary, and the Public Printer, will have become moot, as each of these defendants will have completed its or his role in preparing and communicating to the Senate the Committee's evidentiary record (footnote continued)

The Supreme Court's adjudication of Representative Powell's claim in Powell v. McCormack offers no precedential support for Judge Nixon's attempt to secure relief to restrain impending Senate action. Rather, Powell confirms that the Speech or Debate Clause bars such an effort for anticipatory interference with the Senate's performance of its constitutional function. Representative Powell had sued Members and employees of the House of Representatives to challenge his exclusion, after it had occurred, and had sought an injunction requiring them to perform certain duties discharged on behalf of all congressmen. The Court concluded that the purposes of the Speech or Debate Clause were "fully protected if legislators are relieved of the burden of defending themselves," 395 U.S. at 505, and affirmed the dismissal of the action against the Members, allowing it to be maintained against only the House employees who implemented the final action of the House, id. at 506, 550.

Here, however, Judge Nixon filed a complaint in the midst of the Senate's impeachment proceedings to seek an injunction against the continuation of the proceedings. Unlike Powell, which sought after-the-fact review of completed action only, Judge Nixon's purpose in seeking injunctions against

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for the Senate's consideration. Thus, the only defendant against whom this action retains any possible vitality is the Senate itself. The entry of declaratory or injunctive relief against the Senate's using the Committee's evidentiary record as the basis for its deliberations on the articles of impeachment raises the gravest concerns under the Speech or Debate Clause and the separation of powers.

legislative employees is expressly to "hinder[] in the performance of [legislators'] legislative tasks." Id. at 505. The apt analogy to Judge Nixon's suit is not Powell, but an action to restrain the Legislative Clerk of the Senate from calling the roll of the Senators in an attempt to prevent the Senate from voting on a bill. In such a case -- as here -- "[f]reedom of legislative activity and the purposes of the Speech or Debate Clause" would not be, as they were in Powell, "fully protected if legislators are relieved of the burden of defending themselves," id., while the suit is prosecuted against legislative employees. "Where [the courts] are presented with an attempt to interfere with an ongoing activity by Congress ... within the legitimate legislative sphere," regardless of the identity of the Legislative Branch defendants sued, "[t]he speech or debate protection provides an absolute immunity from judicial interference ... [and] does not allow [the courts] to force the [legislative] inquiry to 'grind to a halt.'" Eastland, 421 U.S. at 509 n.16 (quoting Hutcheson v. United States, 369 U.S. 599, 618 (1962) (plurality opinion)).

B. The Separation of Powers Bars Judge Nixon's Attempt To Restrain the Senate From Trying This Impeachment

Beyond the specific textual bar of the Speech or Debate Clause, the inappropriateness under the separation of powers of the injunctive and declaratory relief that Judge Nixon seeks compelled the dismissal of his complaint. This Court declined an earlier request from Judge Hastings for judicial intervention in the judicial investigatory proceedings that preceded his impeachment, because "a court should be loath to interfere, by means of injunction, with ongoing proceedings by a particular council." Hastings v. Judicial Conference of the United States, 770 F.2d 1093, 1102 (D.C. Cir. 1985), cert. denied, 477 U.S. 904 (1986). The Court held that adjudicating Judge Hastings' constitutional claims "would contravene another aspect of avoidance -- the policy of rendering judgment on the constitutionality of proceedings *while* the proceedings themselves are going on." Id. (emphasis in original). The Court held that the "measure of comity" owed to the judicial investigating bodies barred disrupting their proceedings with premature constitutional adjudication. Id.

Under the constitutional separation of powers, Judge Nixon's request for judicial intervention in the Senate's conduct of his current impeachment proceedings raises far greater concerns than even the important comity interests that underlay the Court's refusal to intervene in proceedings within its own branch. Judge Nixon sued for nothing less than an injunction restraining the continuation of pending proceedings in the Senate. "When an injunction sought in one federal proceeding would interfere with another federal proceeding, considerations of comity require more than the usual measure of restraint, and such injunctions should be granted only in the most unusual cases." Bergh v. Washington, 535 F.2d 505, 507 (9th Cir.), cert. denied, 429 U.S. 921 (1976).[10/] No litigant in the Nation's history under the Constitution has ever been awarded a court order instructing Members of a House of Congress on what business they may conduct, either in committee or on the floor of their Chamber, or in what manner such activity may be pursued. As the district court stated, "The relief sought by plaintiff and intervenor would be utterly foreign to our system of divided powers." App. 3 to Nixon Br. at 6.[11/]

The Supreme Court has specifically addressed the possibility of an impeached officer's seeking judicial intervention to restrain the proceedings against him, and the Court's rhetorical treatment of such a prospect vividly conveys the impediment to judicial intervention under the separation of powers. In Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867), the State of Mississippi sought an injunction restraining President Andrew Johnson from executing a statute on the ground that it was unconstitutional. The Court held that the Constitution barred such relief against the political

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[10/] Cf. Adams v. Vance, 570 F.2d 950, 954-55 (D.C. Cir. 1977) (vacating injunction directing Secretary of State to take action with serious diplomatic consequences, because "when requested immediate injunctive relief deeply intrudes into the core concerns of the executive branch, ... the party seeking this kind of relief would have to make an extraordinarily strong showing to succeed").

[11/] Another district court had similarly concluded at an earlier stage in Judge Hastings' proceedings, "A court cannot restrain the Senate from sitting as a court of impeachment." In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami), 669 F. Supp. 1072, 1077 (S.D. Fla.) (per Butzner, J.), aff'd, 833 F.2d 1438 (11th Cir. 1987).

branches: "The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance." Id. at 500 (emphasis added). The Court continued by addressing the possibility that, if the Court issued an injunction, the President's compliance with the injunction could lead to his impeachment. The Court asked,

> And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court? These questions answer themselves.

Id. at 501.

Consistent with the Supreme Court's teaching, this Court has consistently declined to sanction the use of the courts' equity powers to restrain proceedings of the Congress. The Court held over fifty years ago that courts "cannot enjoin legislative debate." Hearst v. Black, 87 F.2d 68, 72 (D.C. Cir. 1936).[12] Subsequently, the Court affirmed the dismissal of an action challenging on constitutional grounds a Senate subcommittee order, recognizing that, "from the viewpoint of the Constitutional separation of powers," it "cannot interfere with or impede the processes of the Congress by proscribing anticipatorily its inquiries." Pauling v. Eastland, 288 F.2d 126, 128-29 (D.C. Cir.) (Prettyman, C.J.), cert. denied, 364 U.S. 900 (1960). The Court refused to entertain the request for injunctive, or declaratory, relief, because "a declaratory judgment would be as effective an impingement upon and interference with legislative proceedings as a flat injunction would be." Id. at 130. "Thus," the Court concluded, "a declaratory judgment respecting the validity of contemplated Congressional action would violate the doctrine of the separation of powers and would be an illegal impingement by the judicial branch upon the duties of the legislative branch." Id. Respect for the separated roles of the branches compelled the district court's like-minded determination "for prudential reasons ... [to] decline[] to become involved in monitoring the Senate's constitutionally-assigned proceedings." App. 3 to Nixon Br. at 11.[13]

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[12] The Court relied upon Justice Field's observation that "'the application to enjoin the passage of any resolution ... is an application to enjoin a legislative body from the exercise of legislative power, and to enjoin the exercise of such power is not within the jurisdiction of a court of equity.'" Id. (quoting Alpers v. San Francisco, 32 F. 503, 506 (C.C.N.D. Cal. 1887) (Field, J., sitting as a Circuit Justice)). "The fact that ... the legislative action threatened may be in disregard of constitutional restraints, ... as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion, whether right-
(footnote continued)

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fully or wrongfully exercised, is not subject to interference by the judiciary." Id. (quoting Alpers, 32 F. at 506).

[13] As the district court noted, it had itself previously "regularly rejected other petitions seeking judicial supervision of Congressional proceedings." Id. at 6-7. In 1986 the court dismissed Judge Claiborne's identical suit to restrain the completion of impeachment proceedings in the Senate on the ground that a Rule XI committee had compiled the evidentiary record. The court found that "[i]t would be an extraordinary concept inimical to a democratic society for a court to halt the debates or votes of an elected Senate because he does not approve of the methods which have been used." TRO Transcript (footnote continued)

C. The Senate's Exercise of Its Power To Try Impeachments Is Not Reviewable

Dismissal of Judge Nixon's complaint was also mandated because the Senate's exercise of its impeachment authority is not reviewable. Article I, section 3, clause 6 of the Constitution provides that "[t]he Senate shall have the sole Power to try all Impeachments." That Clause constitutes a "textually demonstrable constitutional commitment of the issue to a coordinate political department." Baker v. Carr, 369 U.S. 186, 217 (1962). The district court correctly held, "It is crystal clear that impeachment proceedings are wholly committed to Congress under the Constitution. Thus a classic political question is presented under Baker v. Carr...." App. 3 to Nixon Br. at 4.[14]

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at 4, Claiborne v. United States Senate, Dec. Add. at A-37.

Likewise, in 1981, following his criminal conviction in Abscam, Senator Harrison Williams had brought an action for declaratory and injunctive relief challenging on constitutional grounds the procedures by which the Senate was considering expelling him from the Senate, pursuant to Article I, section 5, clause 2. The court denied Senator Williams' application for a restraining order, stating, "As far as the Court is aware, there has never been an instance in our history where the Federal Courts have presumed to tell a body of Congress, in the middle of its deliberations, how it should deliberate; and this Court does not intend to do it." Transcript of Hearing on Motion for Temporary Restraining Order at 28, Williams v. Bush (D.D.C. Nov. 27, 1981) (per Gesell, J.) (Dec. Add. at A-28); cf. Trimble v. Johnston, 173 F. Supp. 651, 653 (D.D.C. 1959) ("[T]he judicial branch of the Government may not control or direct the legislative or executive departments. Thus, the Federal courts may not issue an injunction ... against the Congress.").

[14] Accord In re Grand Jury Proceedings, 669 F. Supp. at 1077-78 ("Nor can a court review the Senate's decision" in an impeachment proceeding; Judge Hastings' constitutional claims "must be addressed to the forums that are charged with the constitutional duty of conducting impeachments," because "recogni-
(footnote continued)

The district court's rejection of Judge Nixon's "mistaken" view "that a federal district court may supervise the Senate's procedures for impeachment," id., accords with the Court of Claims' holding more than fifty years ago that it lacked the power to review the Senate's removal of District Judge Halsted Ritter:

> We think that when the provision that the Senate should have "the sole power to try all impeachments" was inserted in the Constitution, the word "sole" was used with a definite meaning and with the intention that no other tribunal should have any jurisdiction of the cases tried under the provisions with reference to impeachment.

Ritter v. United States, 84 Ct.Cl. 293, 296 (1936) (emphasis in original), cert. denied, 300 U.S. 668 (1937). "In our opinion, the Senate was the sole tribunal that could take jurisdiction of the articles of impeachment presented to that body against the plaintiff and its decision is final." Id. at 300.

The court based its "conclusion that no court can review the impeachment proceedings," id. at 298, on a careful examina-

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tion of the doctrine of separation of powers precludes the judiciary from imposing restrictions on the exercise of the impeachment power"); TRO Transcript at 4, Claiborne, Dec. Add. at A-37. ("The Senate's exercise of power to try impeachment is clearly not reviewable under the impeachment clause itself."). The court in Claiborne reserved the possibility of judicial review under the due process clause in the event of "unusual and extreme actions that would be hard to visualize," id., but observed that "it is a far cry" from a claim -- like that of Judges Claiborne and Nixon -- about "procedures here which do not employ precisely those which a court, a trial court, in the federal system would employ," to "such a gross violation of elementary rights that this Court would be justified in intervening, notwithstanding the principle I have discussed." Id. at 5, Dec. Add. at A-38.

tion of the history of the impeachment power. The delegates at the Constitutional Convention initially had proposed to give the Supreme Court the power to try impeachments. See 2 M. Farrand, The Records of the Federal Convention of 1787, at 185-86 (rev. ed. 1966). However, after extended debate the Convention transferred the forum for impeachment trials from the courts to the Senate, because in Gouverneur Morris's words, "no other tribunal than the Senate could be trusted." Id. at 551. Alexander Hamilton explained that, as a representative body, only the Senate could be expected to "possess the degree of credit and authority, which might, on certain occasions, be indispensable towards reconciling the people to a decision that should happen to clash with an accusation brought by their immediate representatives," the House, and maintain "the public tranquillity." The Federalist No. 65, at 427 (B. Wright ed. 1961).

The Framers viewed impeachment as fundamentally a political process. Although "crimes of a strictly legal character fall within the scope of the [impeachment] power ... it has a more enlarged operation, and reaches what are aptly termed political offences." 1 J. Story, Commentaries on the Constitution § 764, at 559 (5th ed. 1905). "Many of the offences which will be charged against public men will be generated by the heats and animosities of party," which "are precisely those [matters] which it seems most important to exclude from the cognizance and participation of the judges." Id., § 766, at 560. By "[e]xemption of [the courts] from all participation in, and control over, the acts of political men in their official duties" through impeachment, the Framers sought to promote the "spirit of moderation and exclusive devotion to juridical duties," id. at 561, whose preservation they viewed as essential to maintaining "the reverence and respect belonging to the judicial character," id. at 560.

The second reason for the Framers' determination that the Senate, not the Supreme Court, should try impeachments related to the courts' obligation to conduct criminal proceedings. The Framers intended the impeachment process as an independent mechanism from the criminal process and feared a sacrifice of that independence if the same branch had responsibility for both proceedings. See 2 M. Farrand 500 (Morris). Hamilton explained, "[B]y making the same persons judges in both cases, those who might happen to be the objects of prosecution would, in a great measure, be deprived of the double security intended them by a double trial." The Federalist No. 65, at 428.

The Framers' deliberate substitution of the Senate for the courts as the "sole" trier of impeachments strongly undercuts the claim that the Senate's exercise of its impeachment trial power may be reviewed in the courts.[15] "[W]hile there was some suggestion ... [at the Constitutional Convention] that the Senate might abuse its power, there was no intimation by anyone that the impeachment proceedings might be reviewed or set aside by the courts." Ritter, 84 Ct.Cl. at 298. Professor Charles Black, upon whom Judge Nixon relies, has found "not a shred of affirmative historical evidence that the Framers and ratifiers of the Constitution ever thought for one moment that the lower courts were to deal with impeachment questions." C. Black, Impeachment: A Handbook 61 (1974)(emphasis in original). Professor Black concluded "that the courts have no role to fill" in impeachment trials. Id. at 62. Rather than grafting judicial review on the Senate's exercise of its impeachment power, the Framers gave the Senate "final responsibility ... on facts and on law," id. (emphasis in original), and adopted internal safeguards for its exercise, by requiring that Senators sitting as a court of impeachment "be on Oath or Affirmation" and that "no Person shall be convicted without the Concurrence of two thirds of the Members present." Art. I, sec. 3, cl. 6.

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[15] Accord L. Tribe, American Constitutional Law, § 4-17, at 290 n.2 (2d ed. 1988) ("Given the decision of the Constitutional Convention to transfer impeachment trials from the Supreme Court, where they were initially to have been conducted, to the Senate, the more defensible view appears to be the traditional one of non-reviewability.").

The fact that Judge Nixon challenges the procedure that the Senate adopted for the receipt of evidence in his impeachment trial does not alter the nonjusticiability of his complaint. The Constitution commits to "Each House" the power to "determine the Rules of its Proceedings." Art. I, sec. 5, cl. 2. Pursuant to that authority, the Senate has adopted a body of rules, including the use of committees to gather evidence, to govern its conduct of impeachment trials. In conjunction with the Impeachment Trial Clause, the Rules Clause commits to the sole discretion of the Senate the adoption of rules for conducting impeachment trials. As the Supreme Court held with regard to the rules for determining the existence of a quorum in the Houses of Congress,

> The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just.

United States v. Ballin, 144 U.S. 1, 5 (1892) (emphasis added). Because the Constitution does not prescribe the form of an impeachment trial and the Senate is using a "reasonable ... method of proceeding" that does not "violate fundamental rights," Judge Nixon's plea that "some other way would be better" does not state a cognizable basis for judicial review. Accordingly, the district court properly gave "deference" to "[t]he Senate's interpretation of what type of trial Article I, Section 3 requires." App. 3 to Nixon Br. at 5.

The district court's conclusion that the Senate's decision to use a committee to receive evidence for Judge Nixon's impeachment trial does not present a justiciable controversy is fully consistent with the Supreme Court's adjudication of Powell v. McCormack. In Powell, the Court rejected the contention, which we have not made here, that controversies about Congress's exercise of its authority to exclude or discipline its Members or to try impeachments do not "arise under" the Constitution within the meaning of Article III. 395 U.S. at 514. However, the Court expressly recognized the vitality of the separation-of-powers concern that underlay the district court's refusal in this case to review the Senate's impeachment trial procedures: "Any bar to federal courts reviewing the judgments made by the House or Senate in excluding a member arises from the allocation of powers between the two branches of the Federal Government (a question of justiciability)...." Id. [16]

What the Court held justiciable in Powell was its determination that the Constitution grants the Houses of Congress the power to judge only the qualifications of their Members that are enumerated in the Constitution, not "to set qualifications for membership," id. at 520, as it concluded that the House had sought to do. That holding, however, is not germane here, as Judge Nixon has not alleged that the House's allegations that he committed perjury exceed the scope of the impeachment power in a manner analogous to the House's attempt in Powell to enlarge the exclusion power by adding to the qualifications for office.[17/] Instead, what is important for Judge Nixon's case are the limitations on the Court's decision in Powell. The Court stressed that it was not asserting judicial power to review the Congress's "factual determination that a member did not meet one of the standing qualifications," which presented a controversy that "might still be barred by the political question doctrine." Id. at 521 n.42.[18/] Nor did the case present the question whether, nor did the Court hold that, the use of the word "judge" in Article I, section 5, vests the courts with authority to instruct Congress on the procedures that it may use to evaluate its Members' qualifications. Thus, nothing in the Supreme Court's resolution of Powell provides

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[16] Judge Nixon's extended demonstration of the Court's subject-matter jurisdiction (Nixon Br. at 11-15) misses the point. Aside from the Speech or Debate bar, we have not doubted that Judge Nixon's complaint presents (as the district court found, see App. 3 to Nixon Br. at 3) a controversy arising under the Constitution. However, "there is a significant difference between determining whether a federal court has 'jurisdiction of the subject matter' and determining whether a cause over which a court has subject matter jurisdiction is 'justiciable.'" Powell, 395 U.S. at 512. "[T]he doctrine of separation of powers is more properly considered in determining whether the case is 'justiciable,'" id., and, as the district court correctly held, Judge Nixon's complaint is not justiciable under the separation of powers. App. 3 to Nixon Br. at 11.

[17/] Indeed, we do not understand that there could be any serious issue that the charge that an officer "did knowingly and contrary to his oath make a material false or misleading statement," Nix. App. A-17, to a federal grand jury or investigator, which underlies the impeachment articles against Judge Nixon, states an impeachable offense.

[18/] Indeed, the argument for nonreviewability is textually far stronger for the impeachment trial power than for Congress's power to judge the qualifications of its Members, because the Constitution vests the impeachment trial power using language of exclusivity much clearer than in the Qualifications clause. Compare Art. I, sec. 3, cl. 6 ("[T]he Senate shall have the sole Power to try all Impeachments.") (emphasis added) with Art. I, sec. 5, cl. 1 ("Each House shall be the Judge of the ... Qualifications of its own Members....") (emphasis added).

any support for Judge Nixon's request that this Court intervene to instruct the Senate on what form his trial should take.[19/]

Further, "[w]ere not the express constitutional commitment of rulemaking authority to the houses of Congress sufficient in itself to identify the issues raised here as political questions, 'prudential considerations [would] counsel against judicial intervention,'" Metzenbaum v. FERC, 675 F.2d 1282, 1287 (D.C. Cir. 1982) (per curiam) (quoting Goldwater v. Carter, 444 U.S. 996, 998 (1979) (Powell, J., concurring)), at the particular time sought in the present complaint. Judge Nixon's request for judicial review in the midst of the Senate's proceedings (instead of after their conclusion, as in Powell v. McCormack) renders one "of the other formulations of a political question 'inextricable from the case at bar.'" Powell, 395 U.S. at 549 (quoting Baker v. Carr, 369 U.S. at 217). The Senate's "sole Power to try all Impeachments," Art. I, sec. 3, cl. 6, creates, at the very least, strong "concern with 'the impossibility,'" before the Senate has completed its impeachment trial, "'of a court's undertaking

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[19/] To the extent that Powell provides support for the reviewability of any aspect of the Senate's exercise of impeachment power, that support would be limited to review of violations of explicit textual limitations on the impeachment power analogous to the violation in Powell, such as if the Senate purported to try an officer who had not been impeached by the House under Art. I, sec. 2, cl. 5, to convict an officer "without the Concurrence of two thirds of the Members present," Art. I, sec. 3, cl. 6, or, upon conviction, to impose a "Judgment ... extend[ing] further than to removal from Office, and disqualification," Art. I, sec. 3, cl. 7.

independent resolution without expressing lack of the respect due coordinate branches of government.'" Metzenbaum, 675 F.2d at 1288 (quoting Baker, 369 U.S. at 217).

Assuredly, "[o]ur system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch." Powell, 395 U.S. at 549. However, the "'respect due [a] coordinate [branch],'" id. at 548 (quoting Baker, 369 U.S. at 217), to which the Constitution assigns "sole Power" to perform a particular function mandates that the courts withhold intervention until that branch has completed its exercise of "sole Power" and "given" the Constitution a final construction. That will not occur in this case until the Senate has voted on the articles of impeachment. Exercise of judicial review simultaneously with the Senate's performance of its "sole" trial responsibilities would "reveal a lack of confidence in our political processes," Doe v. McMillan, 412 U.S. at 338 (Blackmun, J., concurring and dissenting), and a lack of "the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority," Rescue Army v. Municipal Court, 331 U.S. 549, 571 (1947). If Judge Nixon's claim is -- contrary to our view -- ever justiciable, the exclusive constitutional commitment of trial responsibility to the Senate would require, as in Powell, the deferral of judicial review until after the Senate's completion of its proceedings.

The prior history of judicial challenges to exercises of impeachment power confirms that, to the extent that judicial review is ever available, it is not available until after the conclusion of the impeachment proceedings. No court, at either the federal or the state level, has ever granted a request like Judge Nixon's for judicial intervention while impeachment proceedings are still occurring.[20] Rather, to the extent that courts have asserted jurisdiction to review impeachment determinations, they have done so only after the completion of impeachment proceedings.[21] Until it disposes of the articles of impeachment, the Senate "has exclusive jurisdiction over this controversy." Kinsella, 475 A.2d at 257.

D. Judge Nixon's Complaint Is Premature

Even apart from the particular constitutional barriers to the adjudication of this complaint, dismissal of the complaint would be required under the traditional standard of ripeness imposed by the courts. The Senate is currently in the midst of taking evidence on the articles of impeachment against Judge Nixon, and, following any further taking of evidence,[22/] argument, and deliberation, it will vote whether to convict or acquit him on the articles. If the Senate acquits Judge Nixon, he will lack any cognizable injury. As the Connecticut Supreme Court held in similar circumstances, "[t]he harm alleged by the plaintiff is at best speculative. It will occur only if he is impeached and convicted of any charges." Kinsella, 475 A.2d at 257. Unless and until the Senate votes to convict Judge Nixon on one or more of the three articles of impeachment, his asserted injury will remain "contingent." United Public Workers v. Mitchell, 330 U.S. 75, 90 n.22 (1947) (quoting Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945)). As this Court noted when it rejected as premature Judge Hastings' constitutional challenge to the judicial investigatory proceedings, "Anything might happen in the proceedings initiated against [Judge Nixon]," which "may terminate ... before sanctions have been imposed upon him." Hastings v. Judicial Conference, 770 F.2d at 1100, 1102.[23/]

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[20] See, e.g., Claiborne; Walton v. House of Representatives of Oklahoma, 265 U.S. 487, 490 (1924) (refusing to enjoin prosecution of impeachment articles against state officer because "[a] court of equity has no jurisdiction over the ... removal of public officers"); Mecham v. Gordon, 751 P.2d 957, 962 (Ariz. 1988) (if Senate had tried an officer whom the House had not impeached, court "would not hesitate to invalidate the results," but "[t]he separation of powers ... prohibits us from intervening in the legislative process"); Kinsella v. Jaekle, 475 A.2d 243, 253, 257 (Conn. 1984) ("[t]he question of judicial intercession during [impeachment] proceedings ... appears to be without precedent"; until an officer has been convicted of impeachment charges, "court intervention in the orderly process of the [legislature]" not justified) (emphasis in original); Hill v. Johnson, 105 S.E.2d 309, 310 (Ga. 1958) (refusing to enjoin impeachment proceedings because "a court of equity has no jurisdiction to enjoin the removal of a public officer").

[21] See, e.g., Smith v. Brantley, 400 So.2d 443 (Fla. 1981) (per curiam); Ferguson v. Maddox, 263 S.W. 888 (Tex. 1924).

[22/] Either in response to a motion by Judge Nixon or on its own action, following the completion of the Committee's proceedings, the Senate may decide to hear evidence on the floor. See page 46 & note 34 infra.

[23/] Accord Memorandum at 2, Williams v. Bush, Dec. Add. at A-31 ("No Senate decision about procedures for consideration of [the resolution to expel Senator Williams] 'has been (footnote continued)

Avoidance of unnecessary constitutional adjudication, see Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting Burton v. United States, 196 U.S. 283, 295 (1905)), is particularly important in this case, which presents important questions about the constitutional autonomy of a coordinate branch. In such cases, courts' "exercise [of] self-restraint in the utilization of our power to negative the actions of the other branches" is especially important, because "repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either." United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

II

THE COURT SHOULD AFFIRM ON THE ALTERNATIVE GROUND THAT JUDGE NIXON'S COMPLAINT FAILS TO STATE A CLAIM FOR RELIEF

If the merits are reached, the Court should affirm the dismissal of Judge Nixon's complaint, because the Senate's appointment of a committee to compile an evidentiary record is a constitutional exercise of its "sole Power to try all Impeachments." Art. I, sec. 3, cl. 6. The requirement that conviction on impeachment be by "trial" was intended to fulfill the Framers' intent that the Senate act in "judicial character as a court." The Federalist No. 65, at 426. The Framers intended

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formalized' nor have the effects of any such decision been 'felt in a concrete way....' Cf. Abbott Laboratories v. Gardner, 387 U.S. 136, 148-9 (1967).").

that the Senate perform this judicial function impartially, "to preserve, unawed and uninfluenced, the necessary impartiality between an individual accused, and the representatives of the people, his accusers." Id. at 427 (emphasis omitted). However, as the district court found, there is no evidence that the Framers intended, by using the word "try," to oblige the Senate to "grant[] the accused all the requirements of modern criminal due process." App. 3 to Nixon Br. at 6. Hamilton recognized that the Senate "can never be tied down by such strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security." The Federalist No. 65, at 428. Justice Story similarly characterized the Senate, acting as a court of impeachment, as a tribunal "confined as little as possible to strict forms." 1 J. Story, § 765, at 560.[24/]

[24/] Justice Story noted "that the strictness of the forms of proceeding in cases of offences at common law is ill adapted to impeachments. The very habits growing out of judicial employments, the rigid manner in which the discretion of judges is limited and fenced in on all sides, in order to protect persons accused of crimes by rules and precedents, and the adherence to technical principles, which, perhaps, distinguishes this branch of the law more than any other, are all ill adapted to the trial of political offences in the broad course of impeachments." Id. at 557-58.

As the district court noted, "at the time the Constitution was drafted, definitions of 'try' included 'to sit in judgment' and 'to examine (a person) for the purpose of testing his qualifications.' Of course, persons and bodies may sit in judgment without having received evidence in the manner Article III courts try criminal charges." App. 3 to Nixon Br. at 6 (quoting Oxford English Dictionary) (footnote omitted).

The Senate adopted the procedure of appointing a committee to assist in compiling the evidentiary record for impeachment trials in order to facilitate its conduct of fair and thorough impeachment proceedings without unduly sacrificing its ability to continue to perform its legislative duties. The use of a committee was first proposed in 1904, when Senator Hoar suggested that the Rules Committee be directed to report whether the Senate "may properly and lawfully provide for taking testimony in such cases by a committee in accordance with the practice of the English House of Lords in such cases, questions of the admission of material testimony and the final argument being reserved for the full Senate." 38 Cong. Rec. 3660 (1904).[25]

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[25] The House of Lords' practice to which Senator Hoar referred, of using committees to hear witnesses in trying impeachments preferred by the House of Commons, traces from 1620. *See* 2 T. Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783*, at 1101 (1816) (in 1620 House of Lords "appointed a select Committee of themselves, to take Examination of witnesses" in trial of Sir Francis Bacon); *id.* at 1116 (House of Lords appointed committee to examine witnesses in trial of Dr. Field, Bishop of Landaff, in same year); *id.* at 1122-24 (in 1621 House of Lords examined witnesses in three committees in trial of Sir Giles Mompesson); 3 H.L. Jour. 350, 352-61, 365 (1624) (in 1624 depositions taken by committees of House of Lords read to House as evidence of impeachment changes against Lionel Cranfield); *see* E. Foster, *The House of Lords, 1603-1649: Structure, Procedure, and The Nature of its Business* 153-61 (1983); N. Williams, *The Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials*, 50 N.Y.U. L. Rev. 512, 528-32 (1975).

Because the English Parliament's impeachment practice was "[t]he model from which the idea of this institution has been borrowed," *The Federalist No. 65*, at 427, Thomas Jefferson (footnote continued)

Senator (later Justice) Sutherland proposed similarly in 1912, in the midst of the Senate's twenty-two-day trial of District Judge Robert W. Archbald, that the Senate's impeachment rules be amended to provide "that in all impeachment cases hereafter instituted, except when the President or Vice President of the United States, a member of the Cabinet, or a member of the Supreme Court of the United States is impeached, the testimony may be taken by the Judiciary Committee and together with findings of fact reported to the Senate for its consideration and judgment." 49 Cong. Rec. 698 (1912). Senator Sutherland explained that, in the course of the Archbald trial,

> time has been taken away from the important business of the Senate. Many of the Senators could not be present to hear the testimony, and of necessity they are obliged to read it before they can act. The same result, it seems to me, would be obtained by referring the case in the

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summarized the House of Lords' impeachment trial procedures for the Senate's use when he served as its President: "The practice is to swear the witnesses in open House, and then examine them there; *or a committee may be named*, who shall examine them in committee, either on interrogatories agreed on in the House, or such as the committee in their discretion shall demand." *Constitution, Jefferson's Manual, and Rules of the House of Representatives*, H.R. Doc. No. 279, 99th Cong., 2d Sess., § 614, at 299 (1987) (emphasis added). Contrary to Judge Nixon's suggestion that *Jefferson's Manual* is "not necessarily authoritative" because Jefferson was in Paris during the Constitutional Convention, Nixon Br. at 38 n.6, the historical record reflects that Jefferson followed the Convention's actions closely. *See* 3 M. Farrand 20, 31, 34-39, 60, 65, 77-78, 104-05, 131-36, 359 (collecting Madison's and other delegates' correspondence with Jefferson during and about Convention); T. Jefferson, *Autobiography*, in *Writings* 71-74 (M. Peterson ed. 1984). Judge Nixon's view notwithstanding, *Jefferson's* "*Manual* ... as a guide for Congressional procedure persists to this day." *Goldwater v. Carter*, 617 F.2d 697, 718 (D.C. Cir.) (en banc) (MacKinnon, J., dissenting and concurring), *vacated on other grounds*, 444 U.S. 996 (1979).

> first instance to the Judiciary Committee to take the testimony and report it to the Senate. Of course, the findings of fact which might be presented by the Judiciary Committee would only be advisory, and not binding on the Senate.

Id.

In 1935, following the ten-day trial of District Judge Harold Louderback, the Senate finally adopted Impeachment Rule XI, authorizing the use of a committee,

> to avoid what always takes place in an impeachment trial before the Senate. There are times when there is not a quorum of the Senate present, when a dozen may not be here, when there are less than the number provided as the membership of the proposed committee to take the evidence. There is no use expecting all the Senate, or a quorum of the Senate, to be present every minute while evidence is being taken. Senators have to read the evidence in the RECORD in order to know what it is.

78 Cong. Rec. 9929 (1934)(Sen. Norris).[26]

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[26] While it was considering the proposal, the Senate was aware of a potential impeachment trial arising from a pending House investigation of Judge Ritter. However, contrary to Judge Nixon's statement, see Nixon Br. at 1, the Senate adopted the Rule in 1935, 79 Cong. Rec. 8309 (1935), prior to Judge Ritter's impeachment the following year. As it developed, the Senate chose not to use the newly adopted Rule during the Ritter trial. Concerns about using the Rule over the objection of the House Managers or Judge Ritter may have contributed to the decision not to use it in that matter. See 80 Cong. Rec. 3425 (1936) (Sen. Austin); id. at 3425-26 (Sen. Ashurst).

Contrary to Judge Nixon's understanding, see Nixon Br. at 2-3, neither the Rule nor the legislative history of its adoption contains any limitation on the Rule's use to trials in which the impeached officer agrees to the use of a committee. Rather, both the text of the Rule and the debate over its adoption manifest the Senate's intent that discretion over using the Rule lie solely with the Senate. See Prov. Add. at A- 5. ("That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony....") (emphasis added); 78 Cong. Rec. 9431 (1934) (Sen. Ashurst) (footnote continued)

In its consideration of Rule XI, the Senate discussed the constitutionality of a committee's receipt of evidence. Responding to an assertion that an impeached officer is "entitled to a full trial in every respect before the entire Senate if he should ask for it," id. at 9928 (Sen. Borah), Majority Leader Robinson stated, "I should think the Senate would be the judge of whether it wished to hear the witnesses in person, or to take their testimony by deposition, or in some other way.... Mr. President, in my judgment, the taking of testimony by a committee constitutes a part of the trial by the Senate." Id. Senator Norris agreed that, following the taking of evidence by an appointed committee, "[t]he trial of the case would take place in the Senate, the evidence would be offered here, and the Senate would pass on it." Id. at 9929.

("The resolution provides that ... if the Senate so desires and makes an order to that effect, the presiding officer may appoint a committee....") (emphasis added); id. at 9927 (Sen. Hebert) (committee appointed if "the Senate sees fit to do so"); id. at 9928 (Sen. Ashurst) (same).

Because no federal officer was impeached during the next fifty years, Rule XI was not used until the impeachment trial of Judge Claiborne in 1986. The district court rejected an identical challenge by Judge Claiborne to the use of Rule XI in that proceeding:

> At best, we have procedures here which do not employ precisely those which a court, a trial court, in the federal system would employ. To the extent of that difference, arguably plaintiff is not as well-off as he would have been otherwise, but from there it is a far cry to a denial of due process....

TRO Transcript at 5, Claiborne, Dec. Add. at A-38.

The Senate had long used committees to hear evidence to assist it in the exercise of its constitutional authority to discipline, to expel, and to judge the elections of, its Members.[27] The Supreme Court had recently established the propriety of this practice in Barry v. United States ex rel. Cunningham, 279 U.S. 597, 613-14 (1929). Further, the Court exercises its own "original Jurisdiction" over "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party," Art. III, sec. 2, cl. 2, by appointing masters to compile an evidentiary record for the Court's disposition.[28] These practices provided support for the Senate's adoption of Rule XI:

> I see no reason why the Senate may not take testimony as testimony is taken by a court of equity, for example, by reference, in the case of a court of equity, to a master, and in the case of the Senate by reference to a special committee or to a standing committee.

49 Cong. Rec. 698 (1912) (Sen. Sutherland).[29]

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[27] See, e.g., 7 Annals of Cong. 33-44 (1797) (expulsion of Sen. Blount); Cong. Globe, 31st Cong., 1st Sess. 1480-81 (1850) (censure of Sen. Benton and Sen. Foote); S. Rep. No. 277, 46th Cong., 2d Sess. (1880) (election dispute).

[28] See, e.g., South Carolina v. Regan, 466 U.S. 948 (1984); Illinois v. Missouri, 384 U.S. 924 (1966).

[29] Accord H.R. Rep. No. 921, Pt. 2, 77th Cong., 1st Sess. 3 (1941) (in impeachment trials "[t]he Senate sits as a court and may call into operation the practices and procedure universally used by courts. For example, the Senate might delegate the actual taking of evidence to a committee ... provided the Senate remains the sole judge of the weight and sufficiency of the evidence and of the guilt or innocence of the accused").

As adopted, Rule XI authorizes the appointment of a committee to report to the Senate "a certified copy of the transcript of the proceedings and testimony had and given before such committee." Id. at 9927. The Senate determined not to permit a Rule XI committee to make any recommendations to the Senate on the ultimate impeachment question,[30] but merely to report to the Senate a certified record of evidentiary proceedings, "leaving it to the Senate and remitting to the Senate its power and right and sole authority to determine the questions of relevancy, materiality, and the weight of the evidence." Id. (Sen. Ashurst).[31] Thus, the full Senate remains the "numerous court," The Federalist No. 65, at 428, which serves as the sole trier of fact and the sole judge of the law, in conformity with Article I, section 3, clause 6.

The Senate is taking a number of steps to ensure that the evidentiary record compiled by the Committee will be as accessible as possible to all of the Senate's Members. First, the Senate directed the Committee to provide a neutral summary of the evidence, with references to the record, in order to

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[30] As the rule had initially been proposed, a committee could possibly have included recommendations on the disposition of the impeachment charges in its report to the Senate. See S. Res. 242, 73d Cong., 2d Sess. (1934). However, the Judiciary Committee amended the rule to ensure that "no committee under the amended resolution would attempt to make a recommendation." 78 Cong. Rec. 9927 (1934) (Sen. Ashurst).

[31] Rule XI explicitly preserves "the right of the Senate to determine competency, relevancy, and materiality" of the evidence taken by the committee. Prov. Add. at A-5.

"assist the Members in their review of the record and preparation for the Senate trial."[32/] Second, the Committee is televising its proceedings live to all Senate offices and videotaping them so that Senators not on the Committee "may examine the proceedings as their schedules permit, without disruption of the other legislative responsibilities of the Senate during this trial." S. Rep. No. 1, 101st Cong., 1st Sess. 112 (1989). Finally, the Senate intends to "assure that Senators have an opportunity to familiarize themselves with the case by delaying floor consideration of the articles of impeachment for a period of time after the parties have concluded their cases before the committee." Id. at 112.[33/]

The Senate's appointment of a committee to compile an evidentiary record for use at trial is a reasonable and prudent exercise of the Senate's responsibility to try impeachments. It is the Senate's purpose in utilizing these procedures to ensure more sustained and thoughtful consideration of the evidence by the Senate than had previously occurred in impeachment trials on the floor, where fewer than "a dozen" Senators

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[32/] S. Rep. No. 101-1, at 113; S. Res. 128, § 5, App. 2 to Nixon Br. The Senate assigned the Hastings Committee the same task. S. Res. 38, § 5, 101st Cong., 1st Sess. (1989), Def. App. 298 (Hastings).

[33/] This suggestion responded to concern that the Senate allocated insufficient time between committee and floor proceedings in the Claiborne impeachment. Id. The Nixon Committee is scheduling its hearings to conclude by mid-September in order to attempt to provide at least one month between its hearings and floor consideration. The period for the Hastings proceeding will be at least two months.

often attended. 78 Cong. Rec. 9929 (1934) (Sen. Norris). In the event that the Senate finds these procedures inadequate for a particular impeachment, Rule XI specifically reserves the Senate's prerogative to hear directly the testimony of any and all witnesses that it desires, by providing that "nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate." Prov. Add. at A-5; see App. 3 to Nixon Br. at 4. As the Committee has advised Judge Nixon, he is free to request the Senate at the outset of floor consideration to avail itself of this prerogative and either to call particular witnesses to testify on the floor or to duplicate the entire Committee proceeding.[34] Whether the Senate were to grant or deny such a motion, and to hear witnesses live, watch them on videotape, or read the transcripts of their testimony, it would be exercising its duty to "try" Judge Nixon's impeachment consistently with the Constitution.

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[34] The Senate denied a request by Judge Claiborne, by a vote of 61 to 32, that it hear testimony on the floor rather than rely solely on the committee record. See 132 Cong. Rec. S15557 (daily ed. Oct. 8, 1986).

CONCLUSION

The Court should affirm the district court's order dismissing Judge Nixon's complaint-in-intervention.

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Dated: September 11, 1989

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 89-5188

The Honorable **ALCEE L. HASTINGS**
U.S. District Judge,

Appellant,

v.

The **UNITED STATES SENATE**, et al.

Appellees.

On Appeal From A Final Decision Of The
United States District Court For The
District Of Columbia

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OTHER AUTHORITIES

The Federalist. 9, 10

2 M. Farrand, The Records of the Federal Convention of 1787 (rev. ed. 1966). 16

SUMMARY OF ARGUMENT

Judge Hastings's complaint raises justiciable issues for which federal intervention is entirely appropriate and immediately warranted. Nothing in his complaint seeks judicial "control" of Senate proceedings. Rather, Judge Hastings's seeks to compel the courts to perform their traditional Article III function of constitutional interpretation. None of the judicially created prudential rules of justiciability bar Judge Hastings's claims. Specifically, the Speech and Debate Clause, Art. I, sec. 6, cl. 1, of the Constitution cannot properly constrain the federal courts from exercising their exclusive task of construing the parameters of the Senate's power within the meaning of the Constitution.

This reply is submitted principally to respond to the argument advanced by the Senate that Judge Hastings's claims are barred by the Speech and Debate Clause, to place into context the ramifications of the absence of substantive judicial review of those claims and to reassert the unconstitutionality of Rule XI and trial by committee. In addition, Judge Hastings briefly responds to the Senate's contentions (1) that double jeopardy does not apply to impeachment proceedings, (2) that the Compensation Clause does not apply to impeachment proceedings, and (3) that laches do not preclude the trial of this impeachment.

The positions advanced by the Senate are disingenuous, internally inconsistent,[1] and underscore the intractable dilemma confronted by Article III judges facing impeachment. The authority, and indeed the obligation, of federal courts to insure that the Constitution is enforced in accordance with basic concepts of fundamental fairness cannot be undermined by such mechanistic constructions which forever insulate abuses of power from judicial review.

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[1] For instance, in its argument against application of double jeopardy principles to impeachment proceedings, the Senate maintains: "In the context of a prior acquittal on criminal charges . . . application of double jeopardy would effectively transfer the constitutional power over impeachment from the

ARGUMENT

I. The Speech and Debate Clause Does Not Bar Judge Hastings's Claims.

The district court held that the Speech and Debate Clause barred unspecified claims raised in Judge Hastings's complaint.[2] That Clause provides:

> [The Senators and Representatives] shall in

Legislative Branch to the Judiciary." Brief of Appellee (No. 89-5188), at 25-26. Nonetheless, in addressing Judge Hastings's objections to the undue delay in the presentment by the House of the Articles of Impeachment to the Senate, and the concomitant delay in the trial thereon, the Senate -- purportedly relying on previous litigation by Judge Hastings's challenging the constitutionality of the Judicial Conduct and Disability Act -- essentially embraces such a transfer and simultaneously attributes any delay to Judge Hastings's implicitly unwarranted challenges to that transfer. In short, the Senate both resists and advocates transfers of power from the Legislature to the judiciary where either position aids in insulating Congressional actions in impeachments from review.

[2] The district court, apparently focusing on the respective duties of the Secretary of the Senate and the Acting Public Printer, both named as defendants in Judge Hastings's complaint, found that "their actions are protected by the Speech and Debate Clause." Hastings v. United States Senate, et al., No. 89-1602-GAG (July 5, 1989), at 10. The court further held, however, that an injunction of the type sought by Judge Hastings would be ineffective because the Senate "could simply designate one of its own members to fulfill their ministerial functions." Id. In conclusion, the court found "the case non-justiciable" by reason, inter alia, of the Speech and Debate clause.

> all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech and Debate in either House, they shall not be questioned in any other Place.

U.S. Const., art. I, § 6, cl. 1. Appellees urge that the "threshold basis for affirmance" of the district court's judgment is precisely this clause. See Brief of Appellee (No. 89-5191), at 13.

The Speech and Debate Clause was adopted to insure that the legislative function the Constitution allocates to Congress may be performed independently. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502 (1975). The "central role" of the Clause is to "prevent intimidation of legislators by the executive and accountability before a possibly hostile judiciary." United States v. Jordan, 383 U.S. 169, 181 (1966).[3] It provides protection against civil as well as criminal actions, and against actions brought by private parties as well as by the executive branch. The Clause does not constitute, however, an absolute bar on all judicial review of congressional exercise of legislative power. Rather, it bars judicial review of conduct by legislators in the "act" of legislating. Kilbourn v. Thompson, 103 U.S. 168 (1881).

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[3] See also Powell v. McCormack, 395 U.S.486, 505 (1969) ("The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions.").

The Supreme Court's analysis of the Speech and Debate Clause has not extended its immunity to all acts performed in an official capacity. Rather, the Court will not extend the Clause beyond the legislative sphere. The Court has formulated the following test for determining when conduct is protected by the Clause.

> Insofar as the Clause is construed to reach [matters other than speech or debate in either house], they must be an integral part of the deliberative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Gravel v. United States, 408 U.S. 606, 625 (1972).

The Senate maintains, both here and before the district court, that the final clause of the quoted language shields Members of the Senate from any "'question'" by Judge Hastings "about the exercise of their constitutional authority to try his impeachment." The Senate misreads Gravel. Although the refusal by the Senate to grant Judge Hastings's motion to dismiss on Fifth Amendment grounds, and its implementation of the Rules Committee recommendation to try him by select committee were arguably legislative acts, clearly, the Speech and Debate Clause protects the Senators only from suit for their positions, debate and actual vote on the questions presented. It does not, however, preclude a constitutional challenge to the implementation of the legislative mandate. Indeed, such a broad reading of the Speech and Debate clause would effectively immunize from constitutional challenge the attempted enforcement any piece of congressional legislation.

In Kilbourn, supra, the Court concluded that while the Speech and Debate Clause provided protection to House Members who had adopted a resolution calling for an illegal arrest, the Clause did not protect those who actually executed the arrest.[4] Expounding upon this principle, in Gravel, the Court noted:

> . . . no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances. Such acts are [not essential to legislating].

408 U.S. at 621.

Similarly, the Senators themselves will and have begun to execute the resolutions challenged by Judge Hastings herein. As such, and in accord with the Court's language in Gravel, those actions are not barred from judicial review by the Speech and Debate Clause. It is this action that Judge Hastings challenges and not the action of the Senators in debating or voting on invalid legislature.[5]

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[4] In Kilbourn, as in other cases, the unconstitutional conduct which was subject to judicial review was not performed by Congresspersons, and, thus, the Court easily found that those who implemented the unconstitutional commands were not protected by the Clause. See, e.g., Powell v. McCormack, supra.; Dombrowski v. Eastland, 387 U.S. 82 (1967). It cannot be reasonably argued that the same patently illegal acts, if performed by a member of Congress, becomes completely insulated from judicial review.

[5] The fact that Rule XI, by its own terms, reserves the right of the full Senate to perform its constitutionally required function does not render Judge Hastings's claim unripe. The appointment of the Committee itself for the stated purpose of taking evidence and hearing testimony is an unconstitutional

Further support for Judge Hastings's view is found in Eastland v. United States Servicemen's Fund, supra. There, the Court held that the federal judiciary could not enjoin the issuance of a subpoena by a Senate subcommittee. The subpoena sought information on the United States Servicemen's Fund (USSF). USSF was not in a position to challenge the subpoena on First and Fifth Amendment grounds through normal procedures, i.e. refusing to comply and raising its objection as a defense in subsequent judicial proceedings, because the subpoena was directed to a third party. USSF filed a complaint in federal court seeking to enjoin issuance of the subpoena. A majority of the Court held that the Speech and Debate Clause protected the Subcommittee's action and concluded that where conduct is in aid of legislation, there is an absolute immunity from judicial review.

In a concurring opinion, Justices Marshall, Brennan, and Stewart noted that the Speech and Debate Clause should not be used to avoid meaningful review of constitutional objections to a subpoena simply because the subpoena is served on a third party. They further noted that the Speech and Debate clause does no more than provide that a Member of Congress may not be called upon to defend a subpoena against constitutional objection. It does not provide that the objection will not be heard at all. 421 U.S. at 516.

Similarly, if Judge Hastings is foreclosed from obtaining

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delegation of the Senate's constitutional responsibility to "try" all impeachments. See infra.

judicial review of unconstitutional actions of the Senate by reason of the Speech and Debate Clause, his objections will never be heard. Such a result is contrary to the teachings of the Court in Kilbourn:

> Especially is it competent and proper for this Court to consider whether [the legislature's] proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine the cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void.

103 U.S. at 199. Accordingly, the Speech and Debate Clause cannot be construed to bar review of Judge Hastings's claims on the merits. The district court thus erred in concluding that the Speech and Debate clause insulates the alleged unconstitutional acts of the Senate from review.

II. Rule XI is patently unconstitutional.

Rule XI permits the trial of an impeached judge to go forward before a Committee of twelve senators as opposed to the full body which will ultimately vote whether to convict or to acquit. The Senate asserts, and the district court embraced, the view that Article I, sec. 3, cl. 6 of the Constitution constitutes a "'textually demonstrable constitutional commitment of the issue [of impeachments] to a coordinate political department.'" Brief of Appellees (No. 89-5191), at 11 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)). From this, the Senate concludes that the manner in which the Senate chooses to structure its impeachment trial procedures, including the use of a committee, is beyond the judicial power of review. Id. Alternatively, the Senate argues that if Judge Hastings's challenge to the use of the committee is justiciable, it should nonetheless be rejected on the merits "because the use of a committee is a constitutional exercise of the Senate's power to try impeachments." Id. at 12.

With respect to the question whether Judge Hastings's challenge to the constitutionality of Rule XI is justiciable, reference is made to the comments by Judge Harold Greene, considering a similar challenge made by Judge Harry E. Claiborne during the trial of his impeachment:

> I do not mean to suggest that, if a congressional body or member took unusual and extreme actions that would be hard to visualize; for example, holding a contemptuous witness in circumstances constituting cruel and unusual punishment, or that all black judges were impeached, but not any white judges, that a court could not inquire or even intervene. Scholars have said that the due process clause applies even to the impeachment power.

Transcript of Motion for Temporary Restraining Order, Claiborne v. United States Senate, C.A. No. 86-2780 (D.D.C. Oct. 8, 1986) (per Greene, J.), appeal dismissed for lack of prosecution, No. 86-5622 (D.C. Cir. Order of March 23, 1987), attached as Exhibit 3 to Appellees Decisions Addendum, at A-37 - A-38.

As Judge Greene's comments make clear, the sole power of the Senate to try impeachments is not unfettered. The procedures employed by the Senate must comport with due process. The question raised by Judge Hastings's challenge clearly comes within the ambit of legitimate judicial review. Specifically, Judge Hastings's claims seeks a determination whether Rule XI constitutes a constitutional exercise of the Senate's power. Judge Hastings submits that it does not.

The Constitution, as the collection of the basic principles and laws that govern our nation, must be read as a whole. Article I, sec. 3, cl. 6, commits to "the Senate" the power and responsibility to "try" impeachments. That the full Senate bears the responsibility to sit as triers of fact in impeachment proceedings is reinforced by additional provisions of the Constitution identified and discussed in detail in Judge Hastings's main brief at 13-18. Moreover, the "reservation clause" of Rule XI does not cure the constitutional defect, nor does it properly insulate the Senate's use of a Committee from review until such a time that the reservation is invoked or rejected. The Rule is facially unconstitutional and the harm is realized in its implementation.

The Senate seeks to avoid its responsibility by reference to passages from the Federalist which have more to do with the latitude in defining offenses than they have to do with the means by which those offenses are to be tried. Brief of Appellees (No. 89-5191), at 38-40. The question who must sit in an impeachment trial is fundamentally distinct from the question what procedures may be properly employed thereafter. Under the Senate's view, its sole power to try impeachments could lawfully be delegated to staff personnel so long as the individual Senators physically cast a vote of acquittal or conviction.[6] Such a view is completely at odds with the Framers' intent, embraced by the Senate as a justification for Rule XI, that the Senate act in "judicial character as a court." The Federalist No. 65.

It is noteworthy that in its defense of Rule XI, appellees make no reply to Judge Hastings's constitutional construction arguments. Rather, the Senate relies primarily upon the self-serving positions advanced by Senators seeking innovative ways in which to avoid the constitutional mandate of Article I. The Senate is fully equipped with and required by both the spirit and letter of the Constitution to employ the full measure of that document to discharge effectively its responsibility to try impeachments. This includes compelled attendance of its members, legislative enactments, and if need be, constitutional amendments. With the awesome power conferred upon the Senate to try impeachments comes the equally awesome responsibility to assume the burden of complying with that mandate, no matter how burdensome it is perceived. The rights of Judge Hastings, both as an individual and as an Article III judge, cannot be, consistent with the text of the Constitution and the concepts of due process embodied therein, abrogated for the convenience of Congress.

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[6] Indeed, under the Senate's view, both of the justiciability and the merits of Rule XI, it has virtually unreviewable power to undermine entirely, through rulemaking, the intent of the Framers that the power to try impeachment reside in the two elected officials from each State.

III. Judge Hastings's Complaint States a Claim for Relief.

A. Double Jeopardy

Principles of double jeopardy preclude the retrial of Judge Hastings on charges on which he was previously acquitted in a court of law. The Framers' intent in this regard is manifest. By restricting impeachment to conviction of "Treason, Bribery, or other high crimes and Misdemeanors," U.S. Const., Art. II, sec. 4, the Framers protected against the parade of horribles the Senate displays in its brief (No. 89-5188) at 27-29. The exception articulated in Article I, sec. 3, cl. 7, permitting the trial of an official on both impeachment and criminal charges is reinforced by the provision of Article II quoted above.

B. Compensation Clause

Appellees argue that the Compensation Clause bears no relation to the process of impeachment. Appellees' argument is premised, however, upon an impermissible presumption of misconduct.[7] Judge Hastings is a duly appointed Article III judge who has been convicted of no crime. As such, he remains cloaked with the protections of the Compensation Clause and entitled to undiminished compensation, unless and until he is removed.[8]

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[7] Aside from the inquisitorial character of a presumption of misconduct, such a presumption is entirely inappropriate here where (1) there exists no direct evidence supporting allegations of misconduct against Judge Hastings, and (2) proceedings on those allegations in the only tribunal to render judgment resulted in a verdict of acquittal.

[8] The Senate's comment that Judge Hastings's claim encompasses the argument that "if he were to be convicted by the Senate, that his removal from office diminishes his salary," Brief

When viewed as a whole, appellees' interpretation of congressional power in impeachments would further undermine judicial independence by eliminating the guarantee of financial security while in office. Specifically, under the Senate's view, an Article III judge is placed in fear of "fundamentally political," virtually unreviewable impeachment proceedings against which he/she may be deliberately placed in a position that without adequate funds, they cannot adequately defend. There is no support for the Senate's position that the Compensation Clause does not apply to impeachments. Nor does Judge Hastings's argument elevate form over substance: absent the security of undiminishable income, the likelihood that an accused federal judge may be wrongly convicted escalates.

C. Undue Delay

In its effort to skirt the issues raised by Judge Hastings's charge of undue delay in the presentment by the House of Articles of Impeachment to the Senate, and consequently, concomitant delay in the trial on now eight year old allegations, the Senate equates Judge Hastings's "delay claim" with his prior challenge to the constitutionality of the Judicial Conduct and Disability Act. See Brief of Appellee (No. 89-5188), at 38. To the contrary, in each of the cases cited by appellees, Judge Hastings's attack on the constitutionality of the 1980 Act was rejected, in part, because

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of Appellee (No. 89-5188), at 35, reflects its inability to address cogently the unambiguous constitutional mandate that the salary of an Article III judge "not be diminished during . . . Continuance in Office." Art. III, sec. 1. Clearly, upon removal, the right to compensation, diminished or otherwise, terminates.

of the independent and sole authority of the House to impeach. In In the Matter of Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit, 783 F. 2d 1488 (11th Cir.)["Hastings II"], cert. denied, 477 U.S. 904 (1986), that court expressly concluded that

> the Constitution';s grant to the House of the sole power of impeachment does not impede Congress's authority to authorize the judiciary, through its collective administrative organs, to conduct an investigation of a complaint against a sitting Article III judge.

783 F.2d at 1512. Moreover, the court held that "the Act's provision for a certification as to possible impeachability does not interfere with the House's sole power to impeach." Id.[9]

Judge Hastings's instant claim in no way replicates the challenge to the authority of the judiciary to initiate and investigate complaints of judicial misconduct. Rather, Judge Hastings challenges the delayed exercise of the House's independent and "sole" authority to impeach, and the propriety of a trial on Articles of Impeachment presented well beyond five years of the alleged misconduct. Under the Senate's view, the exercise of the House's sole power to impeach is indefinitely beholden to the operation of the 1980 Act. That view finds absolutely no support in the cases cited, and cannot be sustained under any principle of constitutional law.

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[9] See also, Hastings v. Judicial Conference, 829 F.2d 91, 97 (D.C.Cir. 1987) (characterizing the holding in Hastings II as a rejection of the "claim that the certification provisions of the Act intrude upon the executive of the House to initiate impeachment proceedings").

The Senate further finds fault with Judge Hastings's legitimate right to challenge the 1980 Act and attributes any delay in the presentment of the Articles of Impeachment to those challenges. The Senate's position is again at odds with the independent authority, and indeed, the obligation, of the House to impeach officials whose conduct warrants a trial by the Senate. Notwithstanding Judge Hastings's challenges of the 1980 Act, the House was free, and constitutionally authorized, at all times to issue Articles of Impeachment. Noting the independence of the House's exercise of its powers of impeachment from the operation of the Act, the Eleventh Circuit stated:

> Although the Judicial Councils Reform and Judicial Conduct and Disability Act provides for the transmission of the Judicial Conference's report and determination that impeachment may be warranted to the House of Representatives, it in no way limits the investigatory power of the House in impeachment proceedings. Such a holding would clearly violate separation of powers principles.

In Re Request for Access to Grand Jury Materials, Grand Jury No. 81-1, Miami (Hastings), 833 F.2d 1438, 1445 (11th Cir. 1987).

In sum, nothing in the operation of the Judicial Councils Reform and Judicial Conduct and Disability Act or in Judge Hastings's challenges thereto, justifies the delay in the House's exercise of its independent, sole constitutional power to impeach. Its failure to present Articles of Impeachment within five years of the alleged misconduct, for the reasons stated in Judge Hastings's main brief, violate the judge's constitutional rights to due process and trial on those Article is thus precluded.

IV. Judicial Review is Prudentially and Constitutionally Warranted.

At the root of all of the Senate's arguments in opposition to Judge Hastings's claims is the position that its power to try impeachments is absolute and, under all circumstances, unreviewable. The doctrine of separation of powers, principally relied upon by appellees, however, is complemented by the equally important constitutional principle of checks and balances. Under our constitutional scheme each branch of government is accorded certain powers which are held in check by the exercise by co-equal branches of those functions within their realm power. The power of judicial review, conferred upon the judicial branch by Article III of the Constitution, is a vital function within our constitutional framework.

The arguments advanced by the Senate alternatively seek to escape review by reference to separation of powers principles, speech and debate protection, prematurity, and/or textual commitment. The ultimate result of the Senate's position, if accepted, is that Article III judges, by virtue of unproved accusations, will without fail be without recourse to challenge the Senate's abuse or excess of power. Neither law nor reason sanction such a result.

The constitutional limbo that invariably will confront judges facing impeachment must be resolved in this proceeding. That the trial of Judge Hastings's impeachment has proceeded must not deter this Court from the proper exercise of its judicial function. The Constitution, its history, the Framer's intent, the established jurisprudence, and contemporary needs uniformly require that the trial of any impeachment comport with fundamental fairness and forego unconstitutional encroachments on the independence of the judiciary. If the arguments urged by the Senate are accepted, the precedent established would be a dangerous one -- one that would permit the political persecutions the Framer's sought to forbid.[10] "[I]t is the responsibility of th[e courts] . . . to act as the ultimate interpreter of the Constitution."[11] Lest the judiciary submit to the admonition of James Madison by "render[ing] the Legislature the virtual expositer, as well as the maker of the laws,"[12] the opinion and judgment of the district court must be reversed.

CONCLUSION

For the reasons set forth above and in appellant's opening brief, appellant respectfully requests that this Court reverse the judgment of the United States District Court for the District of Columbia and declare (1) that the Impeachment Trial Committee established pursuant to Senate Resolution 38 and Rule XI of the Senate Impeachment Rules violate the Constitution; (2) that the denial of funds to Judge Hastings violates the Compensation

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[10] Judge Hastings's in no way presents to this Court that his impeachment constitutes such a case. He has, however, consistently argued, and reasserts here, that the determination of his claims have broader constitutional implications for the trial of any impeachment.

[11] Powell v. McCormack, 395 U.S. at 560 (citing Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803)).

[12] 2 M. Farrand, The Records of the Federal Convention of 1787, at 34 (rev. ed. 1966).

Clause; (3) that the trial of Judge Hastings on the first fifteen articles of impeachment is barred by principles of double jeopardy and due process; and (4) that the delay in the presentment of the first fifteen Articles of Impeachment by the House require that those articles be dismissed.

Respectfully submitted,

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[Oral Argument Scheduled For October 17, 1989]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5191

WALTER L. NIXON, JR.,

Appellant,

v.

THE UNITED STATES SENATE, et al.

Appellees.

On Appeal From The
United States District Court
For The District of Columbia

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SUMMARY OF ARGUMENT

In their Brief, appellees rely principally on an battery of ingenious jurisdictional arguments to oppose the straightforward constitutional challenge presented on this appeal. The central thrust of these justiciability arguments is that the Senate's application of the constitutional impeachment provisions may not be questioned in any court -- that the Senate is the final arbiter of the constitutional requirements for an impeachment.

Appellees' justiciability arguments prove far too much, as appellees themselves concede in a footnote tucked away in a corner of their brief. There must be judicial review of any claim that the Senate's exercise of the impeachment power violates "explicit textual limitations on that power" in the Constitution. See Brief of Appellees 33 n.19. We present precisely such a narrow challenge to the Senate's decision to ignore the textual requirement that the "Senate" shall "try all Impeachments."

Moreover, appellees repeatedly and erroneously characterize this case as an attempt to interfere with ongoing legislative activity. This appeal presents a challenge to completed legislative action -- the adoption by the Senate of Senate Impeachment Rule XI and the application of that rule to the impeachment of Judge Nixon in Senate

Resolution 128 -- which denies Judge Nixon the trial before the Senate that the Constitution provides.

When appellees finally address the merits of this constitutional challenge, they offer an apologia for exalting convenience and procedural shortcuts at the expense of the constitutional values expressed in the plain language chosen by the Framers, that the "[t]he Senate shall have the sole Power to try all Impeachments." U.S. Const., art. I, § 3, cl. 6 (emphasis added). Because the Senate evidently lacks the will to respect that direct constitutional command, this Court must declare Judge Nixon's right to a trial before the full Senate.

ARGUMENT

I. THIS APPEAL IS FULLY JUSTICIABLE, AND THE COURTS MUST DECIDE CASES CONCERNING VIOLATIONS OF EXPLICIT CONSTITUTIONAL LIMITATIONS ON THE IMPEACHMENT POWER

A. The Speech or Debate Clause

Appellees assert that the Speech or Debate clause presents an "absolute bar" to judicial resolution of this case because we supposedly seek to interfere with "'the deliberative and communicative processes'" of Congress. Brief of Appellees 13, 15 (quoting Gravel v. United States, 408 U.S. 606 (1972)). This contention reflects a fundamentally erroneous characterization of this case, and stretches the Speech or Debate clause beyond the breaking point.

When Congress violates a person's constitutional rights, even in its "deliberative and communicative processes," the Speech or Debate clause does preclude a claim based on that violation. That is the plain teaching of Powell v. McCormack, 395 U.S. 486 (1969):

> "Especially is it competent and proper for this court to consider whether its [the legislature's] proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws,

> have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void."

Powell, 395 U.S. at 506 (quoting Kilbourn v. Thompson, 103 U.S. 168, 199 (1881)). Indeed, in apparent recognition of Powell's significance, appellees, in a later portion of their brief addressing the political question doctrine, expressly concede that violations by the Senate of the constitutional requirements for impeachment are judicially reviewable:

> To the extent that Powell provides support for the reviewability of any aspect of the Senate's exercise of impeachment power, that support would be limited to review of violations of explicit textual limitations on the impeachment power analogous to the violation in Powell, such as if the Senate purported to try an officer who had not been impeached by the House under Art. I, sec. 2, cl. 5, to convict an officer "without the Concurrence of two thirds of the Members present," Art. 1, sec. 3, cl. 6, or, upon conviction, to impose a "Judgement . . . extend[ing] further than to removal from Office, and disqualification," Art. I, sec. 3, cl. 7.

Brief of Appellees 33 n.19. Appellees cannot offer any principled distinction between the sort of constitutional issue they concede is justiciable and the issue raised in this case. Thus, by appellees own reasoning, judicial review of this case cannot be barred.[1]

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[1] The limited holding of In re Request for Access to Grand Jury Materials Grand Jury No. 81-1, Miami (Hastings), 833 F.2d 1438 (11th Cir. 1987), which addressed only the question whether a grand jury transcript could be properly released to a House committee for use in an investigation, is not to the contrary. Appellees cite dicta in that case that, at most, indicates that nonconstitutional procedural issues

The District Court's opinion also recognized the same principle, although it stated the principle in the negative: "Absent evidence that the Senate is violating the Constitution, the Court should stay its hand." Slip Op. 4. The District Court plainly understood that, were the Senate violating the Constitution, its actions would be judicially reviewable. The District Court erred, however, in its apparent conclusion that, because it rejected our claim to trial by the full Senate, the claim itself somehow became non-justiciable. Such reasoning, however, turns justiciability notions on their head. It is the character of the legal challenge, not its eventual outcome, that determines justiciability.

Appellees attempt to distinguish Powell by erroneously characterizing the claim we present. Appellees assert that this action, supposedly unlike that in Powell, arose "in the midst of the Senate's proceedings" and seeks "anticipatory interference with the Senate's performance of its constitutional function." Brief of Appellees 19.
But the crux of this appeal is a challenge to the facial constitutionality of a completed legislative act, Senate Impeachment Rule XI, and the constitutionality of that legislation as applied to him by Resolution 128, 101st Cong.,

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may be subject to the clause.

1st Sess. (1989). Brief of Appellant, App. 2. The Senate is not in the process of deliberating over Rule XI, or Resolution 128; all such deliberation is complete. What remains are the injurious consequences of these actions, which give rise to Judge Nixon's claim.

Had a federal judge brought suit during debate over Rule XI to challenge its constitutionality, the Speech or Debate Clause certainly would have barred the action. But that is not this case. Indeed, Williams v. Bush, No. 81-2839 (D.D.C. filed Feb. 3, 1982), on which appellees repeatedly attempt to rely, actually illustrates this very distinction. Senator Williams brought a judicial challenge to the rules the Senate was considering for his expulsion proceeding. The court held, both at the TRO stage and in resolving a motion to dismiss by the Senate, that Senator Williams's complaint was nonjusticiable because the Senate had not yet decided upon a set of rules to apply:

> [A]s Judge Gesell pointed out in the hearing on the temporary restraining order, "plaintiff cannot know what representation and opportunity to present evidence the Senate will authorize until he has presented to that body the claims he makes here." Transcript at 5. No Senate decision about procedures for consideration of S. Res. 204 "has been formalized" nor have the effects of any such decision been "felt in a concrete way . . . ."

Slip Op. 2 (Oberdorfer, J.) (quoted at Brief of Appellees at A-31). Because no set of rules had yet been formalized, the case was premature and subject to the Speech or Debate

Clause. Id. Had Senator Williams challenged the rules after they had been formalized, as we have done in this case, plainly the case would have been justiciable.

That an unconstitutional proceeding may now be in progress does not alter the status of Rule XI and Resolution 128 as completed legislation for Speech or Debate clause purposes, as Williams shows. Were this court to hold otherwise, it would be impossible ever to challenge unconstitutional congressional rules whose consequences have no definite endpoint.[2]

As an alternate argument, appellees suggest that there is no proper defendant in this action. They cite the District Court's statement that "the Senate as an entity cannot be effectively sued," Slip Op. 2, and contend that the employee defendants are also protected by this blanket immunity. But the Supreme Court has never held that members of Congress are always immune from suit under the Speech or Debate Clause. Indeed, in Powell, the Court expressly left open the question whether, if no Congressional employees were involved in the action in question, members of Congress might be the only available defendants. Powell, 395 U.S. 506 n.26.

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[2] For instance, suppose the Senate were to pass a rule permitting only the senior Senator from each state to speak on the floor of the Senate. Under appellees' argument, the challenge to this rule would be barred because it would relate to an ongoing "deliberative and communicative" process.

Similarly, under appellees' reasoning, there could be no constitutional challenge to Congress' exercise of its contempt power so long as the supposed contemnor were still incarcerated, since Congress' action against that individual would still be ongoing. We know from settled precedent, however, that there is no such limitation on a constitutional challenge to the congressional exercise of the contempt power. Kilbourn v. Thompson, supra.

Moreover, appellees never acknowledge that the Senate itself can be, and is, a party-litigant in court actions as plaintiff. See, e.g., 28 U.S.C. §1365 (authorizing Senate actions in federal court to enforce subpoenas); Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985) (Senate has standing to challenge Presidential veto), vacated as moot sub nom. Burke v. Barnes, 479 U.S. 361 (1987); Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974) (same). Surely the Senate cannot have unlimited recourse to the courts at its own convenience yet somehow be deemed an entity of such mystical construction that it cannot be held to answer in court when bedrock constitutional questions are raised concerning its own conduct.

In any event, the individual appellees are properly sued in this action and appellees' attempted reliance on Doe v. McMillan, 412 U.S. 306 (1973), is misplaced. In footnote 10 of that case, the Court stated:

> [T]he fact of congressional authorization for the questioned act is not sufficient to insulate the act from judicial scrutiny. In Powell v. McCormack . . . for instance, we reviewed the acts of House employees "acting pursuant to express orders of the House." . . . We concluded that "although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the

> unconstitutional activity are responsible for their acts."

Doe at 316, n.10 (emphasis added). This case thus fits exactly within the language of the exception set forth in Doe.

This action does not threaten "anticipatory interference" with the Senate's performance of its constitutional function. Rather, it challenges completed action by the Senate to which continuing consequences attach. Both the Senate and the Senate employees are proper defendants. This action is therefore not barred by the Speech or Debate clause.

B. Separation of Powers

Appellees also contend that the District Court properly declined to hear Judge Nixon's suit on grounds of the separation of powers. Appellees again stress the supposedly "ongoing" nature of the Senate proceedings, Brief of Appellees 21, and the allegedly "anticipatory" nature of our claim, id. at 24.

For all the reasons set forth above, appellees' argument misses the mark in its erroneous characterization of this lawsuit, which is based on completed, not ongoing, legislative action. Moreover, the cases cited by appellees do not support their theory.

In Pauling v. Eastland, 288 F.2d 126 (D.C. Cir.), cert. denied, 364 U.S. 900 (1960), the plaintiff was directed to provide specified documents to a Congressional subcommittee by a certain date. Before that date and before any further Congressional action on the matter, he petitioned the District Court to declare the subcommittee's directive void and to enjoin both enforcement of the directive and possible prosecution if he failed to comply. The District Court dismissed the case and this Court affirmed on the basis that no justiciable controversy yet existed. The plaintiff had not yet failed to comply with the directive, nor had the subcommittee cited him for contempt. No actual conflict had yet arisen, and there was no reason to anticipate one.

In sharp contrast, in this case a justiciable controversy now exists regarding completed congressional action (Rule XI and Resolution 128) and the ongoing harm it causes to Judge Nixon. The application of Rule XI through Resolution 128 is a _fait accompli_. Judge Nixon can do nothing to forestall or terminate the injurious impact of Rule XI and Resolution 128. Thus, _Pauling_ does not control.

Hastings v. Judicial Conference of the United States, 770 F.2d 1093 (D.C. Cir. 1985), _cert_. _denied_, 477 U.S. 904 (1986), is likewise inapposite. As in _Pauling_, the plaintiff in _Hastings_ had a clear opportunity to challenge any harmful action by the defendant Judicial Council if and when such action was undertaken:

> [A]ppellant has available his constitutional challenge to the validity of provisions of the Act in every one of the situations in which he is exposed to

> the threat of injury. Thus, he may interpose his consitutional arguments, e.g., as a defense to a subpoena, as a ground for review by the Conference of a Council determination, and in a lawsuit such as this one, brought when injury is significantly more immediate and concrete than it is now.

Hastings, at 1102. Here, by contrast, while appellees' brief (and the District Court's opinion) suggest that the justiciability problem is essentially one of timing, appellees offer no guidance as to when Judge Nixon's claim would, in their view, be justiciable. Indeed, at other points in their brief, appellees appear to take the position that impeachment proceedings are never subject to challenge. See Brief of Appellees 13-18, 25-32.

Finally, appellees' citation of dicta in Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867), does not support their position. Contrary to the hypothetical situation depicted in Johnson, we ask not that this Court "restrain . . . the Senate of the United States from sitting as a court of impeachment," Brief of Appellees 23, quoting Johnson at 501, but rather that this Court declare that the Senate may not evade its constitutional responsibility to try impeachments.

C. Political Question

In arguing that the political question doctrine bars this action, appellees note that the Framers gave the power to try impeachment cases to the Senate to prevent any unfairness in the original judicial trial from being replicated in a second trial in the same court. Brief of Appellees 28-29. Appellees also cite cases for the supposed proposition that impeachment trials are judicially unreviewable.

This argument is disingenuous, at best. As appellees well know, we challenge neither the factual findings of the Senate nor the ultimate vote on any Articles of Impeachment. We do not seek "review" of the Senate's trial. Nor do we challenge the power of the Senate to try the impeachment; rather, we seek to enforce that power.[3]

Appellees cannot cite a single authority for the proposition that the Senate is free to trample on a respondent's constitutional rights without fear of a judicial check. To the contrary, appellees themselves concede that an unconstitutional impeachment proceeding would be subject to judicial challenge. See supra p. 2.[4]

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[3] Appellees' reliance on Ritter v. United States, 84 Cl. Ct. 293 (1936), cert. denied, 300 U.S. 668 (1937) is misplaced. In that case, a judge challenged the Senate's power to effect his impeachment on the grounds that the offenses alleged did not amount to high crimes or misdemeanors and that his acquittal on six articles barred prosecution under a seventh which allegedly only repeated the others. Judge Ritter's claim was, in essence, an attack on the merits of the case, the very type of claim Judge Nixon is decidedly not pursuing.

[4] In their reliance on United States v. Ballin, Joseph & Co., 144 U.S. 1 (1892), appellees again beg the very question we present. They assume that the Senate's adoption of Rule XI did not "ignore Constitutional restraints" on the Senate's rulemaking powers. Their only basis for concluding that Rule XI is within constitutional limits is their own bald and self-serving assertion that the Senate is using a

D. Prematurity

Appellees finally argue that Judge Nixon's challenge is not ripe for judicial resolution because he has suffered no injury unless and until he has been convicted by the Senate. Once again, appellees' contention is both disingenuous and misleading.

It is misleading because, for the reasons set forth above, Judge Nixon's injury occurred at the moment Rule XI was applied to deprive him of his constitutionally guaranteed right to a trial by the Senate. That further injury in the form of a conviction may yet be inflicted does not erase the already existing harm.

Appellees' argument is disingenuous for two reasons. First, appellees oppose judicial review, not only at this stage in the proceedings, but also at the completion of the proceedings, on the ground that it involves a political question. Brief of Appellees 25-32. Appellees cannot have their cake and eat it too: they cannot simultaneously contend that no sufficient injury has yet occurred to permit judicial review, and that a conviction of Articles of Impeachment is never judicially reviewable. Second, when Judge Nixon attempted to raise the issue of trial by committee before the Rule XI Committee, he was informed in no

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"reasonable method of proceeding" and that it does not "violate fundamental rights." Brief of Appellees 30.

uncertain terms that the Senate's decision to deny him a trial before the full body was complete and would not be reviewed within the Senate:

> In short, by the adoption of Senate Resolution 128 establishing this Committee, the Senate has already determined that Rule XI is constitutional and that it should be used in this proceeding. This Committee does not have jurisdiction to alter the Senate's decision, and no useful purpose would be served by requesting the Senate to revisit its determination at this point.

Impeachment Trial Committee, Disposition of Pretrial Motions, First Order, July 25, 1989. Thus appellees concede that the events that are the subject of this case are over.

For a variety of prudential reasons, moreover, the point at which this action was brought, and even the current stage of the proceedings, is a particularly appropriate time for resolution of his claim. First, there still remains an opportunity for the Senate to conduct the impeachment proceedings properly. Timely judicial review of the issues presented will enable the Senate to correct its method of conducting the impeachment proceedings before it wastes time debating and voting based on the report of the Rule IX committee.

Moreover, if judicial review is postponed until after the Senate has voted, a determination that Rule XI and Resolution 128 are unconstitutional would require Judge Nixon to be reinstated and the impeachment proceedings to begin anew. Further, it would be almost impossible for Judge Nixon to obtain a fair and impartial hearing in a new trial, since each Senator would find it extremely difficult to erase from his mind the conclusions formed during the original unconstitutional deliberations, not to mention the likely hostility caused by the necessity of having to re-try the case.

Finally, delaying judicial review will force a more direct confrontation between the legislative and judicial branches. By waiting until later to review Nixon's petition, the court will find itself having to review both the constitutionality of Rule XI and Resolution 128, and the Senate's impeachment decision based on the Rule XI committee report. The confrontation between the judicial and legislative branches will only be exacerbated by postponing judicial review.

II. SENATE IMPEACHMENT RULE XI IS UNCONSTITUTIONAL

When they finally address the merits of our claim, appellees begin with impressive-sounding quotations from Hamilton and Story in support of the notion that the Senate must have a completely free hand in determining the rules and form of impeachment trials. Brief of Appellees 37-38. Again, of course, appellees' broad statements prove far too much. Under appellees' broad assertions of power, for example, the Senate could impose a rule under which the Senate would "try" the impeachment by reviewing the record of respondent's judicial trial. Such a procedure would completely undermine the Framers' intent (described at length in appellees' brief at 28-29) to make the impeachment process independent of the judicial process. There can be no serious dispute that the sentence "The Senate shall have the sole Power to try all Impeachments" has a core meaning that the Senate cannot ignore. In less expansive passages, appellees also attempt to justify the convenience afforded by the use of a committee, to try impeachments. The various rationales they offer are unconvincing.

Appellees first set up and knock down a straw man by asserting that there is no evidence that the Framers wished to assure the impeachment respondent of "all the requirements of modern criminal due process." Brief of Appellees 38 (quoting District Court's opinion at 6). Judge Nixon, of course, has hardly sought to replicate the procedures of a criminal trial, and this lawsuit certainly does not seek that end. We seek only to enforce the constitutional requirement that the decision-makers in the impeachment case actually hear and see the witnesses.

Curiously, appellees also cite Federalist No. 65 in support of the committee approach. Hamilton's words, however, demonstrate the very defect we seek to remedy:

> The necessity of a numerous court for the trial of impeachments is equally dictated by the nature of the proceeding . . . There will be no jury to stand between the Judges, who are to pronounce the sentence of the law and the party who is to receive or suffer it. The

> **awful discretion, which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons.**

Hamilton's meaning could not be clearer -- "no jury" should stand between accused and judge. Those who vote on the articles of impeachment must be the same as those who hear the evidence. Moreover, they must be numerous -- a "small number" is not adequate. Indeed, the Framers rejected the Supreme Court as a court of impeachment in part because of its small number. See Federalist No. 65.

The Rule XI committee is precisely the "jury" that the Framers did not want standing between accused and judge. They are also a "small number" -- barely more than the Supreme Court.

Appellees further suggest that trial by a Rule XI committee is really part and parcel of a trial by the Senate, a mere prelude to a plenary proceeding. In an attempt to downplay the true ramifications of Rule XI and Resolution 128, appellees describe the committee's function in mincing phrases like "receipt of evidence," "compiling the record," and "reporting a certified copy of the transcript." In fact, the committee hearing, as appellees well know, is the one and only trial to which the accused has a right. At no other time can the accused summon and confront the witnesses against him; at no other time can the accused require the Senate to hear his side of the story. After that hearing by a few, 88 Senators are free to vote on the accused's guilt or innocence, almost certainly without having seen or heard a single live witness or, for that matter, any piece of actual evidence.

Pointing to senatorial grousing about the inconvenience of impeachment trials, appellees suggest that, owing to impeachment trials, "time has been taken away from the important business of the Senate." Brief of Appellees 40 (quoting 49 Cong. Rec. 698 (1912) (remarks of Sen. Sutherland)). Indeed, appellees fret that during a trial before the full Senate even fewer Senators would actually attend than the twelve appointed to the Rule XI committee. Brief of Appellees 40-41.

Neither Judge Nixon nor this Court can be made responsible for appellees' purported fears that Senators will violate their constitutional obligation to attend impeachment trials. This Court can only ensure that the Senate observe the few procedures established in the Constitution itself: that the Senate try the case, that the trial be based on Articles approved by the House, that the Chief Justice preside over presidential impeachments, and that a two-thirds vote be required for conviction.

Moreover, appellees' appeal to expediency cannot justify violating a clear constitutional directive. As the Supreme Court held in Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983):

> [T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives -- or the hallmarks -- of democratic government . . . .

462 U.S. at 944. The fact that all Senators must try each impeachment surely may affect the progress of other legislative business, but such an outcome would hardly surprise the Framers, who chose to obligate "the Senate," and not "a committee of Senators" to try all impeachments.

Indeed, appellees' arguments, if taken seriously, could wreak considerable havoc on the entire constitutional structure. The same contentions could, for example, justify the President in declaring war on his own and ignoring Congress completely, on the ground that Congress was awfully busy and all of the members would not show up for the debates, anyway.

Finally, appellees soothingly list a "number of steps" the Senate is taking "to ensure that the evidentiary record compiled by the Committee will be as accessible as possible to all of the Senate's Members." Brief of Appellees 44-45. The list is not only beside the point, but wholly unconvincing. First, the committee helpfully will summarize the evidence, which, as a practical matter, likely will convince many Senators that they need not study the records themselves. Second, appellees make much of the miracle of live and recorded television -- thus, the same Senators who (according to appellees) are too busy to come to the hearing are expected to sit in their offices glued for hours to the television set. If they are too busy to come to the trial, where will they find the time to watch the trial on television? And how will they ask their questions of the witnesses as they view the videotape?

Finally, the District Court apparently found particularly significant that, somehow, "[t]he Committee format has not prevented full participation by the Senate." Slip Op. 4. The District Court pointed out that under Rule XI the full Senate "reserves the right" to call live witnesses prior to the impeachment vote. Id. As the phrasing of this so-called safeguard shows, however, the constitutional requirement is turned on its head and has become an option for the Senators. The issue is not whether Rule XI has "prevented" full participation by the Senate, but whether it unconstitutionally fails to guarantee it. The District Court's point would be stronger, moreover, had the Senate ever asked to hear a witness on the floor under Rule XI. It has not done so.

Appellees seek support for their constitutional shortcut by referencing the use of special masters in cases of original Supreme Court jurisdiction. They neglect to mention, however, that under 28 U.S.C. §1872, all issues of fact in original jurisdiction cases against citizens of the United States must be tried to a jury -- not a special master. See also R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice 497 (6th Ed. 1986). Indeed, more generally, the Sixth and Seventh Amendments provide for "trial by jury" of all criminal and most civil matters, respectively. Although courts have grown overwhelmingly busy since the Bill of Rights was passed, no one has ever questioned that "trial by jury" means trial by a jury -- not by a special master or anyone else. A jury trial may be avoided only at the option of the accused in a criminal trial and of the plaintiff in a civil case. See Ex. Parte Peterson, 253 U.S. 300 (1920).

The two constitutional provisions ought to be read consistently. If trial by jury means by a jury, then trial by the Senate should mean trial by the Senate, not a committee of the Senate.[5]

But appellees' reference to special masters is in the end, perhaps, chillingly ominous. Appellees clearly would like a free hand with respect to impeachment procedure. If permitted to use the committee approach, what next? Will the Senate pass a new rule permitting it to refer the trial of an impeachment to a task force of, say, three Washington lawyers? Is that how the Framers envisioned resolving head-on collisions between two coordinate branches of our government? There is no stopping point to the appellees' arguments.

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[5] As we argued in our opening brief at pp. 2-3, there is a strong basis in the legislative history of Rule XI for a reading of the rule under which trial by committee should be permitted only when the respondent consents. Such a reading would compart with the law's treatment of the right to a trial by jury.

The line must be drawn, and it must be drawn where the Framers drew it 200 years ago. The Senate -- not a committee, not a task force, not a special master -- must try all impeachments.

CONCLUSION

For the reasons stated above and in appellees' opening brief, we respectfully request that this Court reverse the judgment of the United States District Court for the District of Columbia and declare that Impeachment Rule XI and Resolution 128 violate the Constitution by denying appellant a trial before the Senate.

Respectfully submitted,

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STATES COURT OF APPEALS

October 13, 1989

United States Court of Appeals
For the District of Columbia Circuit
FILED OCT 13 1989
CONSTANCE L. DUPRE

The Honorable Constance L. Dupre
Clerk
United States Court of Appeals
  for the District of Columbia Circuit
United States Courthouse
Washington, D.C. 20001

Hastings v. Senate, No. 89-5188
Nixon v. Senate, No. 89-5191

Dear Ms. Dupre:

This letter is submitted pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure to bring to the Court's attention a recent opinion of the Arizona Supreme Court in Mecham v. Arizona House of Representatives, No. CV-89-0245-SA (Sept. 29, 1989), copies of which are attached. Both the appellant and appellees in Nixon v. Senate, No. 89-5191, an appeal which is calendared for argument on October 17, 1989, have cited an earlier opinion in that controversy. See Brief of Appellant, at 20; Brief of Appellees, at 35 n.20. This supplemental authority is cited for the Arizona Supreme Court's discussion of the reviewability of the rules followed by the Arizona Senate in an impeachment trial. Slip op. at 2-4. The opinion of the Arizona Supreme Court is also germane to Hastings v. Senate, No. 89-5188, an appeal which is also calendared for argument on October 17, 1989.

We would also like to advise the Court about the current status of the impeachment proceedings concerning Judge Hastings and Judge Nixon.

The Impeachment Trial Committee on the Articles Against Judge Hastings filed its report with the Senate on October 2, 1989, after having earlier provided it to the parties. S. Rep. No. 156, 101st Cong., 1st Sess. (1989). The report certified to the Senate the evidentiary record that is reprinted in S. Hrg. No. 194, 101st Cong., 1st Sess. (1989). Both the House of Representatives and Judge Hastings have submitted to the Senate their final briefs on the merits. By a unanimous consent agreement propounded by the Senate leadership, the full Senate will hear the final arguments of the parties beginning at 2 p.m. on October 18, 1989. Each side has been allocated two hours for its summation. The unanimous consent agreement provides that the deliberations of the Senate on the articles of impeachment shall begin at 2 p.m. on October 19, 1989. 135 Cong. Rec. S13040 (daily ed. Oct. 12, 1989). Copies of the unanimous consent agreement are also attached.

The Impeachment Trial Committee on the Articles Against Judge Nixon completed its evidentiary hearings on September 13, 1989. The committee has approved its report to the Senate which has been made available to the parties. The report will be formally filed with the Senate the early part of the week of October 16, 1989. The House of Representatives will be filing its final brief today, October 13, and Judge Nixon's final brief is due on October 23, 1989. Floor proceedings in the Nixon impeachment have not been scheduled, but we expect that a date will be set soon after the forthcoming floor proceedings in the Hastings impeachment.

Sincerely,

Michael Davidson

Michael Davidson

cc: Robert S. Catz, Esq.
David O. Stewart, Esq.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5188

September Term, 19 89

C.A. No. 89-1602

Honorable Alcee L. Hastings,
Appellant

v.

United States Senate, et al.

No. 89-5191

Walter L. Nixon, Jr.,
Appellant

v.

United States Senate, et al.

United States Court of Appeals
For the District of Columbia Circuit

FILED OCT 18 1989

CONSTANCE L. DUPRÉ
CLERK

Appeal from the United States District Court
for the District of Columbia

BEFORE: Ruth B. Ginsburg, Silberman and Sentelle,
Circuit Judges.

JUDGMENT

Plaintiffs-Appellants Judge Alcee L. Hastings and Judge Walter L. Nixon, Jr., filed complaints in the United States District Court for the District of Columbia seeking preliminary injunctive and declaratory relief against the United States Senate, the Hastings Impeachment Trial Committee, the Secretary of the Senate, and the Public Printer. By a July 5, 1989 Memorandum and Order, the district court dismissed both complaints. Judge Hastings and Judge Nixon appeal from that dismissal order. Their appeals have been briefed and argued in this court.

After full consideration of the parties' presentations, and with due respect for the United States Senate, which is on the eve of commencing the final stage of impeachment proceedings against each appellant, this court has determined that abbreviated disposition without published opinion is appropriate.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5188 and 89-5191 - 2 - **September Term, 19** 89

See D.C. Cir. R. 14(c).* For the reasons indicated in the accompanying memorandum, it is

ORDERED and ADJUDGED that the July 5, 1989 Order from which these appeals have been taken be affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely position for rehearing. See D.C. Cir. R. 15(b)(2).

Per Curiam
FOR THE COURT:
Constance L. Dupré
CONSTANCE L. DUPRÉ, CLERK

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[*] The court has also consolidated the cases for the purposes of this judgment.

No. 89-5188, The Honorable Alcee M. Hastings v. U.S. Senate, et al. and No. 89-5191, Walter L. Nixon, Jr. v. U.S. Senate, et al.

MEMORANDUM

Appellants' claims are premature. They tender issues sub judice in proceedings currently before the United States Senate, the body charged by the Constitution with authority over those issues. See U.S. Const. art. I., § 3, cl. 6. They seek immediate and definitive judicial resolution of those issues despite the contingent nature of most of their injuries while the matter remains before the Senate.

This circuit, like its sisters, follows the basic rule that a federal court should not hinder or encroach upon an action concerning the same issues pending in a coordinate federal court. "Considerations of comity and orderly administration of justice dictate that two courts of equal authority should not hear the same case simultaneously" absent extraordinary circumstances. See Washington Metro. Area Transit Auth. v. Ragonese, 617 F.2d 828, 830 (D.C. Cir. 1980); Bergh v. Washington, 535 F.2d 505, 507 (9th Cir.), cert. denied, 429 U.S. 921 (1976); Brittingham v. Commissioner, 451 F.2d 315, 318 (5th Cir. 1971); United States v. American Radiator & Standard Sanitary Corp., 388 F.2d 201, 203-04 (3d Cir. 1967), cert. denied sub nom. Decker v. United States, 390 U.S. 922 (1968); Kahn v. Switzer Bros., 201 F.2d 55 (6th Cir.

1952). Nor may a federal court enjoin an ongoing state enforcement proceeding absent a showing of irreparable injury both great and immediate. See Pennzoil v. Texaco, 481 U.S. 1 (1987); Younger v. Harris, 401 U.S. 37 (1971); Douglas v. Jeannette, 319 U.S. 157, 164 (1943); see also 28 U.S.C. § 2283.

In these cases, in which the Senate sits as the constitutionally-designated court of impeachment, we should be at least as hesitant to interrupt proceedings in progress as we would be to interrupt proceedings underway in a state or coordinate federal court. Cf. Adams v. Vance, 570 F.2d 950, 954-56 (D.C. Cir. 1978) ("exceptionally strong showing" required for preliminary injunctive relief that would interfere with "core concerns" of a co-equal federal branch). Indeed, appellants have not identified and we have not found any case in which the judiciary has issued injunctive or declaratory relief intercepting ongoing proceedings of the legislative branch.[1]

Appellants have not shown a threat of great and immediate irreparable harm. In the circumstances presented, we believe it evident that the judges' claims are not ripe for review. Most of their alleged injuries are contingent on future Senate action, which may allow us to pretermit difficult constitutional issues. See Rail Reorganization Act Cases, 419 U.S. 102, 138 (1974). The Senate may revisit its interim decisions before rendering its final judgment on the impeachments. We therefore confront still modifiable rulings on requested procedures and/or attorneys fee payments. And Judge Hastings is in no worse position with regard to his claim of double jeopardy than a defendant in state court who must await a final judgment by the highest court in the state's judicial system before the Supreme Court will review the issue. See Rankin v. State, 78 U.S. (11 Wall.) 380 (1871).[2]

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[1] When a court is asked to interfere with a pending proceeding, the same principles govern the propriety of injunctive and declaratory relief. See Samuels v. Mackell, 401 U.S. 66, 73 (1971).

We also reject appellants' suggestion at oral argument that we hold this case in abeyance until the Senate renders final judgments in the two impeachments. The preemptive relief sought and denied in the district court would not be the thrust of a renewed complaint. Should appellants be convicted, they will be positioned to reassess, without generating avoidable friction, the content of their complaints, the forum in which to lodge their cases, and the defendants appropriately sued.

We underscore, in conclusion, that we have reached no question going to the merits of appellants' challenges. We rule solely that considerations of ripeness and vital comity concerns, fundamental to our federalist system and the balance of power our Constitution establishes, preclude judicial intervention at this juncture.

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[2] Abney v. United States, 431 U.S. 651, 656-62 (1977), is not to the contrary because the principles of comity, informed by separation-of-powers concerns, that animate our decision here are not present in cases of federal appellate court interlocutory review of district court judgments.

DISTRICT OF COLUMBIA
SCHOOL OF LAW

RECEIVED

October 20, 1989

Ms. Constance DuPree, Clerk
United States Court of Appeals
District of Columbia Circuit
United States Courthouse
Washington, DC 20001

RE: Hastings v. United States Senate, No. 89-5188

Dear Ms. DuPree:

This letter is submitted pursuant to the Federal Rules of Appellate Procedure 28 (j), to inform the Court of the conviction and removal of United States District Judge Alcee L. Hastings from the bench by the United States Senate, and to request that the above-captioned case be restored expeditiously to the oral argument calendar for further hearing on the merits of Judge Hastings' constitutional claims.

On October 17, 1989, this Court heard oral argument from Counsel for Judge Hastings and Senate Legal Counsel on the question whether the claims presented were ripe for decision. Today, Friday October 20, 1989, the United States Senate voted 69-26, to convict Judge Hastings on the first article of impeachment. Accordingly, the issues raised by Judge Hastings' federal complaint are clearly ripe for judicial review. Federal courts customarily take cognizance of relevant events occurring during the pendency of litigation. Counsel therefore respectfully requests that this appeal be promptly restored to the oral argument calendar for further hearing on the merits.

Respectfully Submitted,
Counsel for Appellant Alcee L. Hastings:

Robert S. Catz

Stephanie Y. Moore

Terence J. Anderson

Patricia Graham Williams

cc: Michael Davidson
David Overlook Stewart

719 13th Street, N.W. • Washington, D.C. 20005 • (202) 727-5225

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5188 **September Term, 19** 89
C.A. No. 89-1602

Honorable Alcee L. Hastings,
Appellant

v.

United States Senate, et al.

BEFORE: Ruth B. Ginsburg, Silberman and Sentelle, Circuit Judges.

O R D E R

On consideration of the request of appellant to restore this case to the calendar for further hearing, it is hereby

ORDERED that the request be denied. See Memorandum filed October 18, 1989, at 3 (upon conviction appellant "will be positioned to reassess, without generating avoidable friction, the content of [his] complaint[ ], the forum in which to lodge [his] case[ ], and the defendants appropriately sued").

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRÉ, CLERK

BY: LINDA E. JONES,
Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit

FILED OCT 20 1989

CONSTANCE L. DUPRÉ
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

No. A - 19

The Honorable ALCEE L. HASTINGS
United States District Judge,

Petitioner,

v.

The UNITED STATES SENATE,

The IMPEACHMENT TRIAL COMMITTEE,

The Honorable WALTER J. STEWART,
Secretary of the United States Senate,

The Honorable JOSEPH E. JENIFER,
as Acting Public Printer of the
United States,

Respondents.

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APPLICATION FOR INJUNCTION PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To The Honorable William H. Rehnquist,
Chief Justice of the United States and
Circuit Justice for The District of Columbia Circuit:

Petitioner, the Honorable Alcee L. Hastings, United States District Court Judge for the Southern District of Florida, hereby applies to the Court for an injunction pending appeal before the United States Court of Appeals for the District of Columbia Circuit.*

1. This action was instituted before the United States District Court for the District of Columbia seeking declaratory

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*On March 17, 1987, the Chief Justice issued an order as Chairman of the Judicial Conference of the United States pursuant to 28 U.S.C. 372 certifying to the House of Representatives that Judge Hastings may have engaged in conduct that warrants impeachment. Under the circumstances, it may be more appropriate that this application be referred to another member of this Court for a decision.

and injunctive relief pursuant to 28 U.S.C. Sections 2201 and 2202, to protect and secure the rights guaranteed to the petitioner individually and as an Article III Judge by the Constitution of the United States. Petitioner, United States District Judge, Alcee L. Hastings sought temporary and preliminary injunctive relief, pursuant to Rule 65(a) and (b), Fed. R. Civ. P., pending the final adjudication of his claims. The requested relief was denied and the complaint dismissed by order dated July 5, 1989. Hastings v. United States Senate, No. 89-1602 -- GAG (D.D.C.). (A copy of said order is attached hereto).

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. Section 2101 (f) and 28 U.S.C. Section 1254.

3. This motion is made pursuant to Supreme Court Rule 8(a).

4. On July 7, 1989, Petitioner filed an Application for an Injunction Pending Appeal with the United States Court of Appeals for the District of Columbia Circuit under the caption Hastings v. United States Senate, et al, No. 89-5188 (D.C.Cir.)

5. On July 10, 1989, the Court of Appeals denied the requested relief. (A copy of said order is attached hereto).

REASONS FOR GRANTING RELIEF

United States District Court Judge Alcee L. Hastings makes this application for an injunction pending appeal on the ground that he, and this nation's Constitution, will suffer irreparable harm if the Senate trial of his impeachment before a Senate Committee is permitted to proceed as scheduled.

The factors which govern this Court's determination of whether relief is warranted are four-fold:

> (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review. (2) Has the petitioner shown that without such

> relief, it will irreparably injured The key word is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough . . . (3) Would issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest?

Virginia Petroleum Job. Ass'n v. Federal Power Comm'n., 259 F.2d 921, 925 (D.C. Cir. 1958). The answer to these questions with respect to the instant litigation strongly favor issuance of a stay.

1. Public Interest

There can be little doubt that the interest of the people of the country in a full, deliberate judgment on the claims presented by Judge Hastings is paramount. In one fell swoop the district court has dispensed with serious, yet difficult, questions concerning the constitutional framework of our government. Expediency has defined these proceedings thus far. The public interest cries out for a considered judgment that will appropriately safeguard both the integrity and independence of the judiciary.

2. Harm to Others

There exist no harm that will attend the Senate if the impeachment proceedings are enjoined pending appeal comparable to that which will be visited upon Judge Hastings if they are permitted to proceed. As implied by this Court in Virginia Petroleum, "[m]ere injuries," are insufficient both for purposes of granting a stay and for purposes of precluding its issuance where the other party will suffer irreparable harm. That the proceedings before the twelve member Senate Impeachment Committee may be temporarily delayed so that a full and fair resolution of Judge Hastings claims may be had hardly constitutes irreparable harm. That they may be permanently enjoined by a lawful order of this Court constitutes harm to no one; rather, said injunction if issued following full appellate review by the District of Columbia Circuit would constitute a vindication of Judge Hastings' rights to fundamental fairness and a clear and decisive victory for the Constitution of the United States.

3. Irreparable Harm

In Virginia Petroleum the court noted that

The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

259 F.2d at 925. By this standard alone, Judge Hastings' Application here must be granted. For over eight years Judge Hastings has defended himself against assaults on his integrity based on innuendo and circumstantial evidence. He now faces trial before a select committee of twelve Senators in large part on issues that were determined decisively by a jury in his favor in 1983. Extant jurisprudence hold that the substantive determination of the Senate on these Articles of Impeachment are of doubtful reviewability in the courts. See Ritter v. United States, 84 Ct. Cl. 293, 296 (1936), cert. denied, 300 U.S. 668 (1937).

Thus, if Judge Hastings is compelled to sit for the trial of this impeachment before a Committee of twelve, and further if his construction of the Constitution -- i.e., that it requires trial before the full Senate -- is correct, the injury imposed upon Judge Hastings, the people, and Constitution cannot be removed. He will have committed his claims to an unconstitutionally constituted tribunal. The irreparable injury that will flow therefrom, if, as Judge Hastings contends, the requirement to try attaches to all Senators so that an independent, impartial, and informed judgment may be issued, is manifest. The remedy applauded by the District Court should be of no solace. Video tapes do not preserve the full demeanor of a witness, for example, eye contact with others present may be telling and yet may not be captured on film. Senators will undoubtedly resort to chamber-gossip and other short-cuts to gather information and thereafter vote in violation of Judge Hastings' individual rights and in violation of their oath of office and the special oath in these proceedings.

Moreover, and more important, what may preserve the appearance of fairness, indeed what may even protect individual rights -- although we in no way intimate that the procedures adopted will -- is not the relevant inquiry. The inquiry squarely put by Judge Hastings' challenge is "What does the Constitution demand?" The district court has determined that the Constitution requires that the Senate have unfettered, unreviewable, and indeterminate discretion in the conduct of its proceedings. The Constitution states otherwise.

Judge Hastings' faces irreparable harm that is both grave and immediate. Once removed, if removed, he can never vindicate his rights. Thus, although not capable of repetition, his claims will forever evade review. The harm that will attach touches not only this judge, but all federal judges and the people of this country whom they vow to serve. The district court suggests that the advancement of the framer's interest in the independence of the judiciary is "ill-advised." The court further implies that Judge Hastings seeks preferential treatment because of his status as a United States judge. To the contrary, Judge Hastings seeks the fair application of "normal constitutional standards" to him and to the Senate, which by virtue of the district court's opinion, remains "above normal constitutional standards."

4. Likelihood of Success

> To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (i.e., the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the

> plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.

Washington Metropolitan Area Transit Comm'n v. Holiday tours, 559 F.2d 841, 845 (D.C. Cir. 1977) (quoting Hamilton Watch Co. v. Benrus Watch Co., 205 F.2d 738, 740 (2d Cir. 1953).

Judge Hastings' claims satisfies the criteria enunciated above. The district court recognized the difficulty of the questions posed, yet determined, there was no likelihood of success on the merits. The weighty constitutional issues raised by Judge Hastings deserve more tempered consideration. The arguments advanced by both Judge Hastings and Walter Nixon, seek a constitutional mandate that will guide the future development of our nation.

Judge Hastings' has been once acquitted on the principal of the charges that now form the bases of his impeachment. He does not seek "preferential treatment," but rather, he seeks judicial recognition and resolution of the competing claims of what constitutes the proper respect to be accorded the Constitution in all trials of impeachment before the Senate.

Respectfully submitted,

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Counsel for Petitioner

Dated: July 10, 1989

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No. A-19

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

The Honorable ALCEE L. HASTINGS
United States District Judge,

Petitioner,

v.

THE UNITED STATES SENATE,
The IMPEACHMENT TRIAL COMMITTEE,
The Honorable WALTER J. STEWART,
Secretary of the United States Senate,
The Honorable JOSEPH E. JENIFER,
as Acting Public Printer of the
United States,

Respondents.

OPPOSITION TO APPLICATION FOR INJUNCTION

To the Honorable William H. Rehnquist, Chief Justice of the United States and Circuit Justice for the District of Columbia Circuit:

On July 10, 1989, a committee of twelve senators, a defendant in this action, began, pursuant to Senate Impeachment Rule XI,[1] "to receive evidence and take testimony" on the articles of impeachment against United States District Judge Alcee L. Hastings of the Southern District of Florida.[2] The committee established July 10 as the beginning date for these hearings in an order issued ten weeks ago on April 21, 1989.[3] On the applications of the House and Judge Hastings, the committee has issued, or is in the process of issuing, subpoenas for more than sixty witnesses.

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[1] The text of Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials is attached to this Opposition as Exhibit A.

[2] On August 3, 1988, the House of Representatives adopted House Resolution 499, 100th Congress, impeaching Judge Hastings of high crimes and misdemeanors. 134 Cong. Rec. H6193 (daily ed.). The seventeen articles of impeachment allege that Judge Hastings engaged in a corrupt conspiracy in 1981 to obtain money from parties in a criminal case pending before him (Article I), that he testified falsely at his 1983 criminal trial for conspiracy (Articles II-XV), that in 1985 he improperly revealed confidential wiretap information neces-

The committee hopes to complete the taking of evidence within the next three to four weeks. The Congress will be in recess from early August until September 6, 1989. During the August recess, the committee, with the aid of the Acting Public Printer, another defendant, will arrange for printing the testimony and exhibits introduced into evidence by the parties to the impeachment. This will enable the committee, in accordance with Impeachment Rule XI, to "report to the Senate in writing," early in September, "a certified copy of the transcript of the proceedings and testimony had and given before such committee." The committee is authorized to include in that report to the Senate, which is yet another defendant in this action, "a statement of facts that are uncontested and a summary, with appropriate references to the record, of evidence that the parties introduced on contested issues of fact." S. Res. 38, 101st Cong., 1st Sess. (1989); Def. App. 298. The committee will not recommend to the Senate whether it should vote to convict or to acquit on any article. Memorandum of the District Court ("Mem.") at 3.

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sitating the termination of a law enforcement investigation (Article XVI), and that through this conduct Judge Hastings brought disrepute on the federal courts and the administration of justice (Article XVII). See 134 Cong. Rec. H6180-82.

[3] Defendants' Appendix in Opposition to Plaintiff's Motion for Preliminary Injunction: Record of Senate Proceedings in the Impeachment of Judge Alcee L. Hastings ("Def. App.") at 627. This six-volume appendix documents the Senate's proceedings in the Hastings impeachment from the exhibition of the articles on August 9, 1988, through filings and orders on June 23, 1989.

Consistent with the recommendations of the Committee on Rules and Administration, floor proceedings on the impeachment are expected to be scheduled after an interval, lasting probably into October, to allow Senators who are not on the committee to study the record. As the district court noted in its memorandum, Senators will be able to supplement their reading of the record by replaying the videotape of the proceedings "at any time for any purpose such as to evaluate the demeanor of witnesses whose credibility may be placed in issue." Mem. at 3.[4] When the impeachment is taken up on the floor, the evidentiary record submitted by the committee will be "subject," under Impeachment Rule XI, "to the right of the Senate to determine competency, relevancy, and materiality." Also, the rule specifically provides that "nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate." Only after deciding, if a question is raised, whether the record reported by the committee is a sufficient basis for the Senate's action on the articles, will the Senate hear final arguments from the parties, deliberate, and vote.

In the district court, Judge Hastings sought to restrain the Senate's progress toward disposition of the articles through a preliminary injunction against the Secretary of the Senate and the Acting Public Printer. The requested restraint against the Secretary of the Senate would have barred him from paying the salaries of committee staff, and from paying committee expenses. The restraint on staff salaries would prevent the committee from using employees to mark and file the exhibits offered by the parties, arrange for the service of subpoenas, and provide legal advice to the committee. The restraint on committee expenses would prevent the committee from reimbursing the travel and per diem expenses of the parties' witnesses, and prevent the committee from using a court reporting service to produce a transcript of the committee's hearings. The restraint against the Secretary of the Senate also would prevent him from acting as the Senate's officer in receiving the committee's report in September. Finally, the plaintiff sought to restrain the Acting Public Printer from printing and distributing, through officials of the Senate, the committee's report to the full membership of the Senate.

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[4] With the exception of one witness who faces potential risks to his personal safety from any public broadcasting of his current physical appearance, all testimony is also being broadcast live to the public and to all Senate offices to enable Senators not on the committee to view the testimony live. For that one witness, transcripts are being distributed publicly, and videotapes will be available to Senators under secure conditions.

After plenary briefing and argument on July 5, 1989, the district court denied Judge Hastings' motion for a preliminary injunction, and dismissed his complaint.5/ The court concluded that "[t]here is no possibility of success on the merits, all equities favor the Senate, and the public interest will be served by permitting the impeachment trial of Judge Hastings to proceed as contemplated by the Senate." Mem. at 11.

On July 7, 1989 Judge Hastings appealed to the United States Court of Appeals for the District of Columbia Circuit from the district court's decision and moved for an emergency injunction pending appeal and expedited consideration of his appeal. On July 10, the court of appeals denied Judge Hastings'

5/ The district court also denied Judge Nixon's motion for a preliminary injunction and dismissed his complaint. Judge Nixon, whose evidentiary hearings will begin on September 6, 1989, appealed and is currently seeking expedited consideration of his appeal in the court of appeals, but has not sought an injunction pending appeal.

motion, ruling that he had "not demonstrated the requisite likelihood of success on the merits to warrant either injunctive relief pending appeal or expedition." Order, Hastings v. United States Senate, No. 89-5188 (D.C. Cir. July 10, 1989)(per curiam) (Ruth B. Ginsburg, Silberman, Sentelle, JJ.)(citing WMATC v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977)).

THE APPLICATION FOR AN INJUNCTION PENDING APPEAL SHOULD BE DENIED

For this Court to grant an injunction pending appeal, the applicant's "right to relief must be indisputably clear." Communist Party of Indiana v. Whitcomb, 409 U.S. 1235 (1972)(Rehnquist, J., in chambers). Judge Hastings' insignificant chance of success on the merits of his claims, the balance of equities between the parties, and the public interest in the completion of pending proceedings in a coordinate branch all militate against Judge Hastings' extraordinary effort to enjoin the Senate's proceedings on the articles of impeachment.

1. The Constitution Negates Any Chance That Judge Hastings Will Prevail on the Merits of His Appeal

"[I]t is settled that [the Court's] injunctive power 'should be used sparingly and only in the most critical and exigent circumstances.'" Graddick v. Newman, 453 U.S. 928, 937 (1981)(opinion, Powell, J.)(quoting Williams v. Rhodes, 89 S.Ct. 1, 2, 21 L.Ed.2d 69, 70 (1968)(Stewart, J., in chambers)).[6] In particular, "when requested immediate injunctive relief deeply intrudes into the core concerns of [a coordinate] branch, a court is 'quite wrong in routinely applying ... the traditional standards governing more orthodox stays.'" Adams v. Vance, 570 F.2d 950, 954 (D.C. Cir. 1978)(quoting Sampson v. Murray, 415

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[6] Cf. Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n, 479 U.S. 1312, 1313 (1986)(Circuit Justice's issuance of injunction "demands a significantly higher justification" than for issuance of stay)(Scalia, J., in chambers).

U.S. 61, 83-84 (1974))(internal quote in Sampson omitted). In Adams, the core concerns involved were those of the executive branch in exercising the President's constitutionally committed authority over foreign affairs. Here, the core concerns are those of the Senate in exercising its constitutionally committed "sole Power to try all Impeachments." Art. I, sec. 3, cl. 6. The D.C. Circuit's admonition in Adams is consistent with the standards in this Court for injunctive relief pending appeal, that "if such a request is justiciable, the party seeking this kind of relief would have to make an extraordinarily strong showing to succeed." 570 F.2d at 955.

a. This Action Is Barred By The Speech Or Debate Clause

The Speech or Debate Clause of the Constitution, Art. I, sec. 6, cl. 1, which provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place," is "an absolute bar to interference," Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975), by the executive or judicial branches in "the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." Gravel v. United States, 408 U.S. 606, 625 (1972). The absolute bar of "the Speech and Debate Clause prevents [the courts] from questioning Congress about actions taken in the impeachment process. The Speech and Debate Clause is applicable because impeachment is viewed as a legislative activity in the sense that it is one of the 'other matters which the Constitution places within the jurisdiction of either House.'" In re Request for Access to

Grand Jury Materials, Grand Jury No. 81-1, Miami (Hastings), 833 F.2d 1438, 1446 (11th Cir. 1987) (quoting Gravel).

In the district court, Judge Hastings sought to avoid the force of the Speech or Debate Clause by seeking relief from the Secretary of the Senate and the Acting Public Printer. These officials, however, are not like the Sergeant at Arms in Kilbourn v. Thompson, 103 U.S. 168 (1881), who executed the House's order to arrest a witness, or the Sergeant at Arms in Powell v. McCormack, 395 U.S. 486 (1969), who implemented the House's exclusion of Representative Powell by denying him his salary. Rather, the Secretary of the Senate, by disbursing funds for the expenses of the committee, including the salaries of its staff, functions like committee counsel who share in the Speech or Debate immunity of members by helping them to "'cause[] the ... subpoena to be issued ... under the authority of Senate Resolution.'" Eastland, 421 U.S. at 507. As for their receipt, printing, and distribution to senators of the committee's report, the Secretary and the Acting Public Printer are protected by the unanimous holding of the Supreme Court that, while some distribution of congressional reports outside of Congress might be actionable, "Members of Congress and their committee aides and employees are immune under the Speech or Debate Clause for preparation of the Committee report for distribution within the halls of Congress." Doe v. McMillan, 412 U.S. 306, 338-39 (1973)(Rehnquist, J., concurring and dissenting).

Eastland and Doe eliminate any likelihood of reversal of the district court's unassailable conclusion that the Secretary's and Acting Public Printer's "functions in this matter are to assist the Senators in conducting the hearings and disseminating the transcripts and committee report to Senators not on the committee. For the purposes of this action, their internal functions are fully protected by the Speech and Debate Clause." Mem. at 10. The Clause is an absolute bar to the maintenance of this action against the Senate, its committee, and the officials assisting it.

b. The Senate's Exercise of Its Sole Power to Try Impeachments Is Unreviewable

Article I, section 3, clause 6 of the Constitution provides that "[t]he Senate shall have the sole Power to try all Impeachments." In establishing procedures to exercise that "sole Power", the Senate also draws on the grant to each House under Article I, section 5, clause 2 of the Constitution of the power to "determine the Rules of its Proceedings." Resting on these constitutional grants to the Senate, the district court securely rested its dismissal of Judge Hastings' complaint on the additional ground that "[i]t is crystal clear that impeachment proceedings are wholly committed to Congress under the Constitution. Thus a classic political question is presented under Baker v. Carr, 369 U.S. 186, 217 (1962)." Mem. at 4. Fifty years ago, the Court of Claims rejected, for the same reason, Judge Ritter's claim for review of his completed removal from office, concluding that "the word 'sole' was used with a definite meaning and with the intention that no other tribunal should have any jurisdiction of the cases tried under the provisions with reference to impeachment." Ritter v. United States, 84 Ct.Cl. 293, 296 (1936), cert. denied, 300 U.S. 668 (1937). After carefully examining the available historical evidence and legal commentary, the court flatly concluded "that no court can review the impeachment proceedings and set them aside. ... In our opinion, the Senate was the sole tribunal that could take jurisdiction of the articles of impeachment presented to that body against the plaintiff and its decision is final." Id. at 298, 300.[7]

Similarly, the district court denied an application by the last official to be impeached, Judge Harry E. Claiborne, for preliminary injunctive relief restraining the Senate from proceeding with his impeachment proceedings, based on a claim identical to Judge Hastings' challenge to the Senate's use of a committee. The court held that "[i]t would be an extraordinary concept inimical to a democratic society for a court to halt the debates or votes of an elected Senate because he does not approve of the methods which have been used." Transcript of Hearing on Motion for Temporary Restraining Order, Oct. 8, 1986, at 4, Claiborne v. United States Senate, C.A. No. 86-2780 (D.D.C.)(per Greene, J.). After the court of appeals denied Judge Claiborne's motion for summary reversal and injunctive relief, the Chief Justice and Justice Marshall denied his application for emergency relief. Letter of Clerk, Oct. 16, 1986, No. A-275 (S. Ct.).

The conclusion that the Senate's exercise of the power of trying impeachments is not reviewable is strongly supported by the development of the impeachment provision at the Constitutional Convention. Initially, the Framers had proposed to give the Supreme Court the power to try impeachments. See 2 M. Farrand, The Records of the Federal Convention of 1787, at 185-

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[7] Accord In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami), 669 F. Supp. 1072, 1077 (S.D. Fla.)(per Butzner, J.) ("A court cannot restrain the Senate from sitting as a court of impeachment.... Nor can a court review the Senate's decision."), aff'd, 833 F.2d 1438 (11th Cir. 1987). Judge Butzner agreed with the parties before him, the House and Judge Hastings, that he "should not decide [Judge Hastings'] defenses of double jeopardy and denial of a speedy trial. Pleas of double jeopardy and denial of a speedy trial are pleas in bar that must be addressed to the forums that are charged with the constitutional duty of conducting impeachments." Id.

86 (rev. ed. 1966). However, after extended debate the Convention transferred the forum for impeachment trials from the courts to the Senate, because in Gouverneur Morris' words, "no other tribunal than the Senate could be trusted." Id. at 551. Alexander Hamilton explained that, as a representative body, only the Senate could be expected to "possess the degree of credit and authority, which might, on certain occasions, be indispensable towards reconciling the people to a decision that should happen to clash with an accusation brought by their immediate representatives," the House, and maintain "the public tranquillity." The Federalist No. 65, at 427 (B. Wright ed. 1961).

The Framers viewed impeachment as fundamentally a political process. Although "crimes of a strictly legal character all within the scope of the [impeachment] power ... it has a more enlarged operation, and reaches what are aptly termed political offences." 1 J. Story, Commentaries on the Constitution § 764, at 559 (5th ed. 1905). "Many of the offences which will be charged against public men will be generated by the heats and animosities of party," which "are precisely those [matters] which it seems most important to exclude from the cognizance and participation of the judges." Id., § 766, at 560. By "[e]xemption of [the courts] from all participation in, and control over, the acts of political men in their official duties" through impeachment, the Framers sought to promote the "spirit of moderation and exclusive devotion to juridical duties," id. at 561, whose preservation they viewed as essential to maintaining "the reverence and respect belonging to the judicial character," id. at 560.

The Framers' deliberate substitution of the Senate for the courts as the "sole" trier of impeachments strongly undercuts the claim that a conviction on impeachment charges may be reviewed in the courts. "[W]hile there was some suggestion ... [at the Constitutional Convention] that the Senate might abuse its power, there was no intimation by anyone that the impeachment proceedings might be reviewed or set aside by the courts." Ritter, 84 Ct.Cl. at 298. Rather than grafting judicial review on the Senate's exercise of its power, the Framers adopted safeguards within the Senate's trial mechanism by requiring that Senators sitting as a court of impeachment "be on Oath or Affirmation" and that "no Person shall be convicted without the Concurrence of two-thirds of the Members present." Art. I, sec. 3, cl. 6.

In Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867), the State of Mississippi sought an injunction restraining President Andrew Johnson from executing a statute on the ground that it was unconstitutional. This Court held that the Constitution barred such relief against the political branches. Addressing the possibility that, if the Court issued an injunction, the President's compliance with the injunction could lead to his impeachment, the Court asked,

> And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court? These questions answer themselves.

Id. at 501. The district court's conclusion that plaintiff's complaint is "non-justiciable" and that it must "decline[] to become involved in monitoring the Senate's constitutionally-assigned proceedings," Mem. at 11, thus accords with this Court's long-standing recognition that it would be alien to the Framers' design for the courts to intervene in a pending impeachment.

c. The Appeal Is Also Not Likely to Succeed Because the Complaint Fails to State a Claim for Relief

We rest principally on the district court's memorandum to show that if the complaint was justiciable, it should nonetheless be dismissed for failure to state a meritorious claim, and add the following only for emphasis.

Judge Hastings' claim that the constitutional bar against double jeopardy precludes his trial on impeachment on the bulk of the articles was given careful consideration by the Senate, which rejected his motion to dismiss. His motion was thoroughly briefed, see S. Doc. No. 4, 101st Cong., 1st Sess. (1989), and argued to the full Senate on the floor in two hours of oral argument in which Judge Hastings personally participated, 135 Cong. Rec. S2250-64 (daily ed. Mar. 15, 1989), Def. App. 280-94. The Senate concluded, as did the district court, that the Framers' decision to limit the consequences of impeachment to removal from office, and possibly (but not necessarily) the disqualification to hold future office, leaving all questions of personal punishment to the courts in prosecutions brought by the executive, "acknowledges separate and different roles for the executive's power of prosecution and the legislature's impeachment powers." Mem. at 8-9.[8] The district court correctly noted that, while the Senate denied Judge Hastings' motion to dismiss without trial, senators may again weigh Judge Hastings' claim when they deliberate on the articles. Mem. at 8

8/ Accord In the Matter of the Impeachment Inquiry Concerning U.S. District Judge Alcee L. Hastings: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 100th Cong., 1st Sess. 348 (1987)(Appendix 1) (reprinting report of Circuit Judges Godbold, Tjoflat, and Johnson, and District Judges Pointer and Kelley)("It must be remembered that, as to the charges involving bribery, impeachment does not serve the same purpose as criminal prosecution. Impeachment is remedial and designed to protect the institution of government from corrupt conduct.... [D]ouble jeopardy principles are not applied to an impeachment proceeding.").

& n.5 (citing 135 Cong. Rec. S2804 (daily ed. March 16, 1989) (remarks of Sen. Specter)).

With respect to the Senate's appointment of a committee to report an evidentiary record, the district court had ample basis to conclude that "[t]he procedures adopted do not by their terms violate any constitutional rights or offend fundamental notions of justice." Mem. at 5. The Constitution's commitment to the Senate of the power to "try" impeachments was intended to fulfill the Framers' intent that the Senate act in "judicial character as a court." The Federalist No. 65, at 426. The Framers intended that the Senate perform this judicial function impartially, "to preserve, unawed and uninfluenced, the necessary impartiality between an individual accused, and the representatives of the people, his accusers." Id. at 427 (emphasis omitted). However, the Framers did not intend to obligate the Senate to replicate all features of a judicial trial. Hamilton recognized that the Senate "can never be tied down by such strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security." Id. at 428. Justice Story similarly characterized the Senate, acting as a court of impeachment, as a tribunal "confined as little as possible to strict forms." 1 J. Story, § 765, at 560.[9]

---

[9] Justice Story noted "that the strictness of the forms of proceeding in cases of offences at common law is ill adapted to impeachments. The very habits growing out of judicial employments, the rigid manner in which the discretion of judges is limited and fenced in on all sides, in order to protect persons accused of crimes by rules and precedents, and the adherence to technical principles, which, perhaps, distinguishes this branch of the law more than any other, are all ill adapted to the trial of political offences in the broad course of impeachments." Id. at 557-58.

The sole function of the Rule XI committee is to "report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee," and a neutral summary of uncontested facts and of the evidence on disputed factual issues. S. Res. 38, § 5, Def. App. 298. In the proceeding before the committee, Judge Hastings will have an opportunity with the assistance of counsel and the subpoena power of the Senate to develop a record to present to the full Senate. Rule XI explicitly preserves "the right of the Senate to determine competency, relevancy, and materiality" of the evidence taken in the committee. Thus, "the evidence would be offered [in the Senate], and the Senate would pass on it." 78 Cong. Rec. 9929 (1934) (Sen. Norris). Rule XI specifically reserves the Senate's prerogative to hear directly the testimony of any and all witnesses that it desires. Judge Hastings is free to request the Senate at the outset of floor consideration to avail itself of this prerogative and either to call particular witnesses to testify on the floor or to duplicate the entire trial. Whether the Senate were to grant or deny such a motion, and to hear witnesses live, watch them on videotape, or read the transcripts of their testimony, it would be exercising its duty to "try" Judge Hastings' impeachment consistently with the Constitution. The full Senate remains the "numerous court," The Federalist No. 65, at 428, which serves as the sole trier of fact and the sole judge of the law under the authority of Article I, section 3, clause 6 of the Constitution.

2. Judge Hastings Will Not Be Irreparably Harmed by the Evidentiary Proceedings of the Impeachment Trial Committee

Judge Hastings argues that he will be irreparably harmed by the evidentiary proceedings of the impeachment trial committee because "[h]e will have committed his claims to an unconstitutionally constituted tribunal." Application for Injunction Pending Appeal at 4. His argument fails to demonstrate harm, let alone irreparable harm, because it misconstrues the function of the committee. Neither the House nor Judge Hastings will be committing their claims to the committee. As described above, the committee serves as a conduit to the Senate, which retains full and final control over the record that will form the basis for the Senate's deliberations on the articles. Further, to the extent that Judge Hastings argues that the harm he anticipates will be irreparable because the Senate's final judgment may be unreviewable if he is convicted, id. at 5, that consequence would flow from the constitutional separation of powers, and is not a basis for anticipatory judicial intervention in the proceedings of the Senate.

3. Other Parties Would Be Harmed by an Injunction

Twelve members of the Senate have arranged and rearranged many of their other obligations to be in attendance at the evidentiary proceedings that began on July 10 and will last through the month of July. House managers and counsel have prepared for months to attend and participate in these proceedings. Dozens of both parties' witnesses have been subpoenaed to be in Washington for these hearings, and have had to make arrangements in their own business and personal lives to do so. The disruption that would be caused by any restraint imposed by this Court should count heavily against an injunction pending appeal. Cf. Westermann v. Nelson, 409 U.S. 1236, 1236-37 (1972)(Douglas, J., in chambers)(denying injunction to avoid disrupting orderly election processes); Graddick v. Newman, 453 U.S. at 936 (opinion of Powell, J.)(denying injunction to avoid confusion and disruption of prison system).

4. The Public Interest Weighs Against Any Delay in the Senate's Proceedings

The House exhibited the impeachment articles against Judge Hastings on August 9, 1988. More than eight months ago, when it acceded to Judge Hastings' request to postpone the impeachment proceedings until the succeeding Congress, the Senate directed the parties that they "shall be prepared by March 1, 1989, or as soon thereafter as the Senate determines testimony should be heard, to present their evidence." S. Res. 480, § 3, 134 Cong. Rec. S13750 (daily ed. Sept. 30, 1988), Def. App. 95-96. The Senate then delayed its decision whether to appoint an evidentiary committee until the full Senate could hear and decide Judge Hastings' motions to dismiss. In order to be entirely fair to the parties, and to permit Judge Hastings unprecedented discovery in an impeachment proceeding, including the taking of pretrial examinations, the committee then exercised its discretion to defer the beginning of the evidentiary proceedings for four additional months, to July 10, 1989.

Thus, eleven months will have elapsed from the exhibiting of the impeachment articles to the beginning of evidentiary proceedings. This period compares with an interval of five weeks between exhibition and trial in Judge Claiborne's impeachment,[10] and is the longest period provided before taking evidence on any articles of impeachment in the Nation's history.[11] The people of the Southern District of Florida have a need for a full district court. The Senate has a responsibility to bring these impeachment proceedings to completion "in order to return Judge Hastings to the courtroom if he is acquitted or, if Judge Hastings is convicted, to allow the President to nominate and the Senate to confirm a replacement judge." 135 Cong. Rec. S6451 (daily ed. June 9, 1989), Def. App. 628. The public interest militates strongly against any restraint on the Senate's measured progress toward the final disposition of this impeachment.

---

[10] See 132 Cong. Rec. 19495 (1986); S. Rep. No. 511, 99th Cong., 2d Sess. 3 (1986).

[11] See 14 Annals of Cong. 89, 153 (1804-05) (Judge Chase; 8-1/2 weeks); 6 Cong. Deb. 411; 7 Cong. Deb. 9 (1830) (Judge Peck; 7-1/2 months); Cong. Globe, 37th Cong., 2d Sess. 2277, 2942 (1862) (Judge Humphreys; 5 weeks); Cong. Globe, 40th Cong., 2d Sess. 1647, Supp. 29 (1868) (President Johnson; 3-1/2 weeks); 4 Cong. Rec., Pt. 7, at 2, 174 (1876) (Secretary of War Belknap; 3 months); 39 Cong. Rec. 1281, 2229 (1905) (Judge Swayne; 2-1/2 weeks); 48 Cong. Rec. 9051; 49 Cong. Rec. 21 (1912) (Judge Archbald; 4-1/2 months); 76 Cong. Rec. 5474-75 (1933); 77 Cong. Rec. 3397 (1933) (Judge Louderback; 10 weeks); 80 Cong. Rec. 3485, 4972 (1936) (Judge Ritter; 3-1/2 weeks).

CONCLUSION

The application for an injunction pending appeal should be denied.

Respectfully submitted,

Michael Davidson
Senate Legal Counsel

Ken U. Benjamin, Jr.
Deputy Senate Legal Counsel

Morgan J. Frankel
Assistant Senate Legal Counsel

642 Hart Senate Office Building
Washington, D.C. 20510
(202) 224-4435

Counsel for Respondents

Of Counsel:

Elaine W. Stone
Mark A. Klugheit

Counsel
Impeachment Trial Committee

Dated: July 11, 1989

RULES OF PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING ON IMPEACHMENT TRIALS

XI. That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

EXHIBIT A

JUSTICE BYRON R. WHITE'S DENIAL OF HASTINGS' APPLICATION FOR INJUNCTION

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

RECEIVED JUL 1 3 1989

JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

AREA CODE 202
479-3011

July 11, 1989

Robert S. Catz, Esq.
c/o District of Columbia School of Law
719 - 13th Street, N.W.
Washington, D.C. 20005

Re: Alcee L. Hastings, United States District
Judge v. United States Senate, A-19

Dear Mr. Catz:

Your application for injunction pending appeal in the United States Court of Appeals for the District of Columbia Circuit in the above-entitled case was presented to Justice White who has endorsed thereon the following:

"The application is denied
Byron R. White
July 11, 1989"

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By:

Francis J. Lorson
Chief Deputy Clerk

th

cc: Michael Davidson, Esq.
Terence J. Anderson, Esq.

HASTINGS' RESUBMISSION OF APPLICATION FOR INJUNCTION TO JUSTICE WILLIAM J. BRENNAN, JR.

Robert S. Catz
719 13th Street, N.W.
Washington, D.C. 20005
(202) 727-5225

July 11, 1989

RECEIVED JUL 1 1 1989

Mr. Frank Lawson
Deputy Clerk
U.S. Supreme Court
Washington, D.C. 20534

Re: Hastings v. U.S. Senate

Dear Mr. Lawson:

Please refer our petition for an injunction pending appeal which was denied this date by Associate Justice White to Associate Justice Brennan for further consideration.

Thank you for your assistance.

Sincerely,

Robert S. Catz
Counsel for Judge Hastings

cc: Michael Davidson

SUPREME COURT'S DENIAL OF HASTINGS' RESUBMITTED APPLICATION FOR INJUNCTION

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

AREA CODE 202
479-3011

August 11, 1989

Robert S. Catz, Esq.
c/o District of Columbia School of Law
719 - 13th Street, NW
Washington, DC 20005

RECEIVED AUG 14 1989

RE: Alcee L. Hastings, United States District
Judge v. United States Senate
Application No. A-19

Dear Mr. Catz:

The Court today entered the following order in the above-entitled case:

"The application for injunction addressed to Justice Brennan and referred to the Court is denied. The Chief Justice took no part in the consideration or decision of this application."

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

by

Francis J. Lorson
Chief Deputy Clerk

cc: Michael Davidson, Esq.
Clerk, U.S. Court of Appeals for
the District of Columbia Circuit
(Your No. 89-5188)

FILINGS IN THE FEDERAL COURTS BY THE PARTIES AND RELEVANT JUDICIAL ORDERS IN RE: IMMUNITY PROCEEDINGS CONCERNING WILLIAM A. BORDERS, JR.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST
JUDGE ALCEE L. HASTINGS

The United States Senate
Washington, D.C. 20510,

Applicant.

Misc. No. 89-129

APPLICATION FOR ORDER IMMUNIZING TESTIMONY AND OTHER INFORMATION PROVIDED BY WILLIAM A. BORDERS, JR.

1. The Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings applies to this Court for an order, pursuant to 18 U.S.C. §§ 6002 and 6005, immunizing, from use in prosecutions, testimony and other information provided by one of its potential witnesses, William A. Borders, Jr., at proceedings of the Impeachment Trial Committee.

2. The presiding officer of the Senate has appointed, pursuant to Senate Resolution 38, 101st Congress, and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Impeachment Trial Committee to receive evidence and take testimony on the articles of impeachment against Judge Alcee L. Hastings at such times and places as the committee may determine. A copy of Senate Resolution 38 as agreed to on March 16, 1989, is attached as Exhibit A; a copy of Impeachment Rule XI is attached as Exhibit B.

3. On June 7, 1989, by a vote of nine of its twelve members, the Impeachment Trial Committee adopted a resolution directing the Senate Legal Counsel to apply for an order immunizing testimony and other information provided by the witness at its proceedings. The committee's resolution is attached as Exhibit C.

4. It is anticipated that the witness would invoke his constitutional privilege against self-incrimination if subpoenaed to testify.

6. In accordance with 18 U.S.C. § 6005, we notified the Attorney General on June 8, 1989, of the Impeachment Trial Committee's intention to request this order. A copy of the notice to the Attorney General is attached as Exhibit D. A certificate of service of Exhibit D is attached as Exhibit E.

7. On June 9, 1989, the Attorney General's designee waived the Attorney General's statutory right to a ten-day waiting period between notification and the filing of this application, and waived the Attorney General's right to seek a limited deferral of the issuance of an immunity order. A copy of the letter from the Department of Justice containing these waivers is attached as Exhibit F.

Wherefore, the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings respectfully requests that this Court issue an order immunizing from use in prosecutions testimony and other information provided by William A. Borders, Jr., at proceedings of the Committee.

Respectfully submitted,

Michael Davidson
Senate Legal Counsel

Ken U. Benjamin, Jr.
Deputy Senate Legal Counsel

Morgan J. Frankel
Assistant Senate Legal Counsel

642 Hart Senate Office Building
Washington, D.C. 20510
(202) 224-4435

Counsel for Impeachment Trial Committee
on the Articles Against
Alcee L. Hastings

Of Counsel:

Elaine W. Stone
Mark A. Klugheit

Dated: June 14, 1989

S. Res. 38

In the Senate of the United States,

March 16 (legislative day, January 3), 1989.

Resolved, That pursuant to Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Presiding Officer shall appoint a committee of twelve senators to perform the duties and to exercise the powers provided for in the rule.

SEC. 2. The Majority and Minority Leader shall each recommend six members to the Presiding Officer for appointment to the committee. The committee shall designate one of its members to be chairman and one of its members to be vice chairman.

SEC. 3. The committee shall be deemed to be a standing committee of the Senate for the purpose of reporting to the Senate resolutions for the criminal or civil enforcement of the committee's subpoenas or orders, and for the purpose of printing reports, hearings, and other documents for submission to the Senate under Rule XI.

SEC. 4. During proceedings conducted under Rule XI the chairman of the committee is authorized to waive the require-

EXHIBIT A

ment under the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials that questions by a Senator to a witness, a manager, or counsel shall be reduced to writing and put by the presiding officer.

SEC. 5. In addition to a certified copy of the transcript of the proceedings and testimony had and given before it, the committee is authorized to report to the Senate a statement of facts that are uncontested and a summary, with appropriate references to the record, of evidence that the parties have introduced on contested issues of fact.

SEC. 6. Necessary expenses of the committee shall be paid from the contingent fund of the Senate from the appropriation account "Miscellaneous Items" upon vouchers approved by the chairman of the committee.

SEC. 7. The Secretary shall notify the House of Representatives and counsel for Judge Alcee L. Hastings of this resolution.

Attest:

Walter Stewart

Secretary

RULES OF PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING ON IMPEACHMENT TRIALS

110 XI. That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

EXHIBIT B

101TH CONGRESS **RESOLUTION**
1ST SESSION

of the Impeachment Trial Committee
on the Articles Against Judge Alcee L. Hastings

To immunize from use in prosecution the testimony of,
and other information provided by,
William A. Borders, Jr.

June 7, 1989

MR. BINGAMAN, the Chairman of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, submitted the following resolution to the Committee, which approved it by a vote of 9 of its twelve members on the 7th day of June, 1989.

Whereas, the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings has been appointed, pursuant to Senate Resolution 38, 101st Congress, and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, to receive evidence and take testimony on the articles of impeachment against Judge Alcee L. Hastings;

Whereas, the Committee may require William A. Borders, Jr., to testify and provide other information at its proceedings;

Whereas, the Committee anticipates that William A. Borders, Jr., may refuse to testify or provide other information at its proceedings on the ground of self-incrimination; and

Whereas, pursuant to 18 U.S.C. §§ 6002 and 6005, a committee of the Senate may seek, by two-thirds vote, a court order immunizing testimony and other information provided by a witness from use in prosecutions other than for perjury, giving a false statement, or otherwise failing to comply with the court order: Now, therefore, be it

Resolved, That the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, pursuant to 2 U.S.C. §§ 288b(d) and 288f, directs the Senate Legal Counsel to apply for a court order immunizing from use in prosecutions the testimony of, and other information provided by, William A. Borders, Jr., at proceedings of the Committee.

Attest: A True Copy

Anthony L. Harvey

Anthony L. Harvey
Committee Administrator

EXHIBIT C

MICHAEL DAVIDSON
COUNSEL
KEN U. BENJAMIN, JR.
MORGAN J. FRANKEL
ASSISTANT COUNSEL

PHONE: (202) 224-4435
TELECOPIER: (202) 224-3391

United States Senate
OFFICE OF SENATE LEGAL COUNSEL
WASHINGTON, DC 20510-7250

NOTICE OF INTENTION TO REQUEST ORDER CONFERRING IMMUNITY

TO: The Honorable Dick Thornburgh
The Attorney General of the United States
Washington, D.C. 20530

Please take notice that the undersigned, as representative of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, will request the United States District Court for the District of Columbia, pursuant to 18 U.S.C. § 6005 and 2 U.S.C. §§ 288b(d) and 288f, to issue an order immunizing from use in prosecutions the testimony of, and other information provided by, William A. Borders, Jr., at proceedings of the committee.

Michael Davidson
Michael Davidson
Senate Legal Counsel
642 Senate Hart Office Building
Washington, D.C. 20510
(202) 224-4435

Dated: June 8, 1989

EXHIBIT D

U.S. Department of Justice

Office of Legislative Affairs

RECEIVED JUN 1 2 1989

Office of the Assistant Attorney General

Washington, D.C. 20530

June 9, 1989

Michael Davidson, Esquire
Senate Legal Counsel
Room 642, Senate Hart Office Building
Washington, D.C. 20510-7250

Dear Mr. Davidson:

This is in response to your notice dated June 8, 1989, to Attorney General Thornburgh of the intention of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings to apply for an immunity order for William A. Borders, Jr.

The Department of Justice has no objection to the proposed order to compel the testimony of William A. Borders, Jr. and hereby waives the provisions of 18 U.S.C. Section 6005(b)(3) and (c).

Sincerely,

John Mackey for
Carol T. Crawford
Assistant Attorney General

cc: Elaine W. Stone
Impeachment Trial Committee
(On the Articles Against Judge Alcee L. Hastings)
Room 902D, Hart Senate Office Building
Washington, D.C. 20510

EXHIBIT F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS The United States Senate Washington, D.C. 20510, Applicant.	Misc. No. 89-129

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR ORDER IMMUNIZING TESTIMONY AND OTHER INFORMATION PROVIDED BY WILLIAMS A. BORDERS, JR.

The Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, appointed pursuant to Senate Resolution 38 of the 101st Congress and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, is applying to this Court for an order immunizing testimony and other information which may be provided to the committee by William A. Borders, Jr. The application is presented pursuant to 18 U.S.C. § 6005, which provides, in relevant part:

> § 6005. Congressional proceedings.
>
> (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before either House of Congress, or any committee ... of either House, ... a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to

> give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.
>
> (b) Before issuing an order under subsection (a) of this section, a United States district court shall find that--
>
> (1) * * * *
>
> (2) in the case of a proceeding before a committee ... of either House of Congress ... the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and
>
> (3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.
>
> (c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

This law provides the mechanism by which a witness before a congressional committee receives "use immunity" for testimony. The immunized witness remains subject to prosecution for the transactions about which he or she testifies if the government sustains the burden of proving at trial that it did not use the immunized testimony or its fruits in the prosecution. See Kastigar v. United States, 406 U.S. 441, 459-62 (1972). Because the court's inquiry on an application for an immunity order is narrow and its tests are mechanical, the application may be decided ex parte without a hearing. Ryan v. Commissioner of Internal Revenue, 568 F.2d 531, 540 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978).

Section 6005 sets out the two requirements for an immunity order, both of which have been met.[1] First, "in the case of a proceeding before a committee ... of either House of Congress ... the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee." 18 U.S.C. § 6005(b)(2). The Impeachment Trial Committee's resolution (Exhibit C to the application), shows that the Committee approved this request for an order by a vote of nine of its twelve members on June 7, 1989.

Second, on June 8, 1989, "the Attorney General was served with notice of an intention to request the order." 18 U.S.C. § 6005(b)(3); see Exhibits D and E to the application. On June 9, 1989, the Attorney General's designee waived both the requirement that the notice be served "ten days or more prior to the day on which the request for such an order was made," 18 U.S.C. § 6005(b)(3),[2] and the Attorney General's right to further delay under 18 U.S.C. § 6005(c). See Exhibit F to the Application.

---

[1] The Impeachment Trial Committee may apply for this order prior to summoning the witness to testify or provide information at one of its proceedings. In re Application of United States Senate Permanent Subcommittee on Investigations (Cammisano), 655 F.2d 1232, 1236-38 (D.C. Cir.), cert. denied, 454 U.S. 1084 (1981).

[2] "[T]he Department [of Justice] may waive the ten-day notice requirement." Cammisano, 655 F.2d at 1236.

Accordingly, the Impeachment Trial Committee requests that the Court issue an order immunizing the testimony and other information which William A. Borders, Jr., may provide at proceedings of the committee.

Respectfully submitted,

Michael Davidson
Senate Legal Counsel

Ken U. Benjamin, Jr.
Deputy Senate Legal Counsel

Morgan J. Frankel
Assistant Senate Legal Counsel

642 Hart Senate Office Building
Washington, D.C. 20510
(202) 224-4435

Of Counsel:

Elaine W. Stone
Mark A. Klugheit

Dated: June 14, 1989

RECEIVED JUN 21 1989

FILED
JUN 20 1989
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE)
ON THE ARTICLES AGAINST)
JUDGE ALCEE L. HASTINGS,)
)
Applicant.) Misc. No. 89-129-LFO
)
)
)
)
)

ORDER

Upon consideration of the application by the United States Senate's Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings for an order granting immunity to William A. Borders, Jr., and compelling his testimony, it is this 19th day of June, 1989, hereby

ORDERED: that a hearing shall be held in this matter on June 26, 1989, at 1:45 p.m. in Courtroom No. 3.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS	)	
Applicant.	)	Misc. No. 89-129 LFO

OPPOSITION OF WILLIAM A. BORDERS, JR. TO APPLICATION FOR ORDER IMMUNIZING TESTIMONY AND OTHER INFORMATION

Now comes, William A. Borders, Jr., by and through his attorneys, respectfully opposing the application of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings for an order granting use immunity to him from prosecution which might result because of testimony given at the Hastings impeachment trial. The reasons offered in support of this Opposition are set forth more particularly below.

I. INTRODUCTION

On June 7, 1989, the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings (hereinafter "the Trial Committee") adopted a resolution instructing the Senate Legal Counsel to apply for an order, pursuant to 18 U.S.C. 6002 and 6005 granting use immunity to William A. Borders, Jr., a potential witness at the Hastings impeachment trial. *See* Exhibit A attached hereto.

In accordance with 18 U.S.C. 6005, the Trial Committee notified the Attorney General of its intention to request a use immunity order from the Federal District Court for the District of Columbia. This written notification to the Department of Justice is dated June 8, 1989. See Exhibit B Attached hereto.

On June 9, 1989, the Senate Legal Counsel received a letter from the Department of Justice which purported to waive the provision of 18 U.S.C. 6005(b)(3) and (c). In the signature position is the name "Carol T. Crawford, Assistant Attorney General." The name is in typeface. The letter is signed by "John Mackey." See Exhibit C attached hereto.

On June 14, 1989, the Trial Committee filed an application for an order granting use immunity to Mr. Borders were he to be called as a witness in the Hastings impeachment trial. On June 20, 1989, this Court issued an order requiring the parties to appear at a hearing on the matter.

II. ARGUMENT

A. Title 18 of the United States Code, sec. 6005 provides, inter alia:

> 6005. Congressional proceedings
>
> (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such

> individual to give testimony or to provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.
>
> (b) Before issuing an order under subsection (a) of this section, a United States district court shall find that-
>
> * * * *
>
> (2) in the case of a proceeding before a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee, and
>
> (3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order[.]
>
> (c) Upon application to the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

The preceding statutory provisions govern grants of use immunity in cases where an individual may be called as a witness before a committee or subcommittee of the House or Senate or a joint committee of both Houses of Congress. The Trial Committee is a committee of the Senate and therefore comes within the purview of 6005. It is settled law that a request for use immunity (18 U.S.C. 6002 - 6005) by a committee of a House of Congress is a constitutionally valid excercise of a statutory right. See In re Sealed Case, See 791 F.2d 179; 180-181 (D.C. Cir. 1986); cert denied, 479 U.S. 924 (1986); see also In re Sealed Case, 776 F.2d 335 (1985); see generally P.A. Robinson, Criminal Law Defenses, 205 (Vol. 2) at 482-488 (1984).

It is equally clear that a request for use immunity must strictly comply with the requirements of 18 U.S.C. 6005. The District Court "is to be a checkpoint" for ensuring that the procedural requirements of the provision have been met prior to the issuance of an order granting use immunity. Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270, 1278 (1973). The Court must "scrutinize the record to make certain that the congressional request for an immunity order is jurisdictionally and procedurally well-founded, and that the Attorney General has been notified." Id.

There are two procedural requirements under 6005(b) which are applicable to the case sub judice: (a) the request for immunity must be approved by two-thirds of the full Committee (6005(b)(2)); and (b) at least ten days prior to the filing of the immunity request, the Committee must provide the Attorney General with notice of its intention to seek immunity for the witness (6005 (b)(3)). We submit that the Committee has failed to comply with the 10-day notice requirement set out in 6005 (b)(3). Thus, the application for the use immunity request is procedural defective and must be denied by the Court.

B. On June 8, 1989, the Trial Committee properly notified, Richard Thornburgh, the Attorney General of the United States, of its intention to request an immunity order. See Exhibit B attached hereto. On June 9, 1989, a letter purporting to waive 18 U.S.C. 6005(b) and (c) was sent to Michael Davidson, Senate Legal Counsel. This letter was not signed by the Attorney General personally. It was signed by John Mackey for Carol T. Crawford, Assistant Attorney General. On its face, 6005(b)(3) does not specifically provide for a waiver of the 10-day notice provision. However, the decisional law of this circuit has interpreted 6005(b)(3) to be directory and not mandatory. The Attorney General, in his discretion may waive the provision since the provision inures only to the benefit of the Department of Justice. _In re Application of the United States Permanent Subcommittee on Investigations (Cammisano)_, 655 F. 2d 1232, 1235-1236 (D.C. Cir. 1981), _cert. denied_, 454 U.S. 1084 (1981); _See Application of United States Senate Select Committee on Presidential Campaign Activities_, 361 F. Supp. 1270 (D.D.C. 1973); _see also Application of United States Senate Select Committee on Presidential Campaign Activities_, 361 F. Supp. 1282 (D.D.C. 1973).

There is no discussion in the case law indicating the circumstances which would justify a designee of the Attorney General acting in his stead. In _Application of the United tates Senate Select Committee on Presidential Campaign Activities_, 361 F. Supp. 1282 (D.D.C. 1973), the Attorney General, represented by the Watergate Prosecutor, Archibald Cox, waived the 10-day notice requirement of 6005(b)(3) and the 20-day deferred period (6005(c)) without objection. Nevertheless, the letter of June 9, 1989, from the Department of Justice was signed "John Mackey for Carol T. Crawford, Assistant Attorney General." Neither John Mackey nor Carol T. Crawford is the Attorney General and it is impossible to say which is the designee. The June 9, 1989, letter does not satisfy the requirement of 6005(b)(3) even if we assume the designee of the Attorney General is Carol T. Crawford. The procedural defect remains since the letter was signed by John Mackey. There is absolutely no way to determine the identity or position of John Mackey. Does the law permit the assumed designee of the Attorney General, Carol T. Crawford, to delegate her responsibility or authority to John Mackey? Mr. Mackey may be an individual who is incompetent or incapable of serving as a designee. Nor is there any way to determine if Carol T. Crawford is Mr. Thornburghs designee. Unfortunately, the case law under 6005(b)(3) does not resolve the problem. The statute is silent as to whom a designee of the Attorney General must be.

The wiretap case of United States v. Giordono, 416 U.S. 505 (1974), is similar to this case and is instructive. In Giordano, the Supreme Court of the United States strictly contrued 18 U.S.C. 2516(1) (Title III of the Omnibus Crime Control and Safe Streets Act of 1968). Section 2516 States, inter alia;

> the Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal Judge . . . for . . . an order authorizing or approving the interception of wire or oral communications.

The Defendant Giordano, a narcotics dealer, challenged evidence derived from a wiretap by the FBI on his telephone during the suppression hearings, it developed that the initial wiretap had been authorized by the Attorney General's Executive Assistant, not the Attorney

General or his special designated Assistant Attorney General. U.S. v.Giordano, 416 at 510. After a careful review of the statute's legislative history and a thorough analysis of 2516(1), the Supreme Court held that Congress did not intend the power to authorize wiretap applications to be exercised by any individuals other than the Attorney General or an Assistant Attorney General specially designated by him. Id. at 512-523. Section 2516(1) was intended to limit the power to authorize wiretap applications to the Attorney General and to any Assistant Attorney General he might designate. Id. at 512-514. The purpose of restricting approval of wiretap applications to the Attorney General or his specially designated Assistant Attorney General was to make sure that this critical act of judgment, affecting individual civil rights, was the exercise of mature judgment by a responsible official in the Department of Justice. Id. at 516, 517-518.

Accordingly, the authorization or approval of the wiretap application by the Attorney General's Executive Assistant contravened 18 U.S.C. 2516(1). All evidence derived as a result of such approvals was suppressed.

By analogy, if a designee under 6005(b)(3) waives the 10-day notice rule, the identity of the designee must be clear and ascertainable. The rationale of Giordano is applicable here. The individual waiving the 10-day notice period should be a mature, responsible official capable of properly exercising critical judgment as to whether the provision should be waived. The legislative purpose of 6005(b)(3) indicates that this is an important provision. It provides the Department of Justice time to lobby for a change of minds on the part of the Congressional Committee, should the Attorney General object to the grant of immunity. It also gives the Attorney General an opportunity to insulate from a grant of immunity any incriminating data already in his files prior to the witness' testimony. Cammisano, 665 F.2d at 1236.

We submit that the letter of June 9, 1989, sorely fails to reveal who authorized the waiver of the 10-day notice provision. The letter is confusing and ambigious. The signature on the document is that of an individual who attempts to exercise a power delegated to the assumed designee of the Attorney General. Is the designee John Mackey or Carol T. Crawford? It is impossible to make the determination. Consequently, the 10-day notice procedural requirement of 6005(b)(3) has not been met. The letter of June 9, 1989 is inadequate to waive the provision. The application for an order granting use immunity to Mr. Borders was filed on June 14, 1989. Notice of intent to request the order was given to the Attorney General on June 8, 1989. The application should have been filed on June 18, 1989, 10-days after notice was given to the Attorney General. Furthermore, the letter did not effectively waive 6005(c) which allows the Attorney General to request that the district court defer subsection (a) for a period, not longer than 20-days from the date of the request for such order. However, 6005(c) unlike 6005(b)(3) is not a condition precedent for filing the request for a use immunity order with the District Court.

III. CONCLUSION

Accordingly, for the reasons set forth above, William A. Borders requests that the application of the Trial Committee be denied.

Respectfully submitted,

Michael Rosier
1411 K Street, N.W.
Suite 711
Washington, D.C. 20005
(202) 638-7100

Marvin Arrington
First Atlanta Tower
22nd Floor
Two Peachtree Street, N.E.
Atlanta, Georgia 33083

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

. . . .

IMPEACHMENT TRIAL COMMITTEE .
ON ARTICLES AGAINST JUDGE
ALCEE HASTINGS .

. . . .

MISCELLANEOUS NO.
89-129

WASHINGTON, D. C.
JUNE 29, 1989
1:45 P. M.

TRANSCRIPT OF HEARING BEFORE THE
HONORABLE LOUIS F. OBERDORFER,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

MICHAEL DAVIDSON, ESQ., SENATE LEGAL COUNSEL
MORGAN FRANKEL, ESQ., ASSISTANT COUNSEL
MARK KLUGHERT, ESQ., COUNSEL, IMPEACHMENT TRIAL COMMITTEE

ALAN I. BARON, ESQ., SPECIAL COUNSEL TO HOUSE OF REPRESENTATIVES

MICHAEL S. ROSIER, ESQ., COUNSEL FOR WILLIAM BORDERS

- - - - -

(PROCEEDINGS REPORTED BY MACHINE SHORTHAND; TRANSCRIPT PREPARED BY NOTEREADING.)

PROCEEDINGS

THE DEPUTY CLERK: MISCELLANEOUS NO. 89-129, IMPEACHMENT TRIAL COMMITTEE ON ARTICLES AGAINST JUDGE ALCEE HASTINGS.

THE COURT: MR. DAVIDSON, BEFORE YOU BEGIN, I WANT TO PUT ON THE RECORD THAT MY OFFICE HAD A CALL FROM COUNSEL FOR JUDGE HASTINGS, TERRY ANDERSON, SAYING THAT HE DID NOT PLAN TO APPEAR AND TOOK NO POSITION ON YOUR MOTION.

MR. DAVIDSON: YES, YOUR HONOR.

THE COURT: IS THERE ANYTHING YOU WANT TO TELL ME ABOUT IT?

MR. DAVIDSON: ABOUT --

THE COURT: ABOUT THE MOTION?

MR. DAVIDSON: ABOUT THE MOTION, YES.

THE COURT: ALL RIGHT.

MR. DAVIDSON: MR. ANDERSON HAD CALLED AND HAD ADVISED ME ABOUT THAT FACT, AS WELL.

THE COURT: VERY WELL.

MR. DAVIDSON: YOUR HONOR, I HAVE HAD SOME LARYNGITIS OVER THE PAST WEEK, AND I HOPE I CAN BE UNDERSTOOD.

THE COURT: WELL, I HAVE HAD A COUGH, TOO. WE CAN HAVE A CHORUS.

MR. DAVIDSON: THIS IS AN APPLICATION BY THE COMMITTEE THAT HAS BEEN APPOINTED BY THE SENATE TO RECEIVE EVIDENCE ON THE ARTICLES OF IMPEACHMENT AGAINST JUDGE HASTINGS. UNDER

THE IMMUNITY STATUTE, THERE ARE TWO PRINCIPAL PREREQUISITES FOR AN IMMUNITY APPLICATION.

ONE IS THAT THE COMMITTEE VOTE BY TWO-THIRDS OF ITS MEMBERSHIP, AND THERE IS ATTACHED TO THE APPLICATION THE RESOLUTION THAT WAS AGREED TO BY NINE OUT OF THE 12 MEMBERS. THEY WERE THE NINE MEMBERS PRESENT AT THE TIME.

THE SECOND PREREQUISITE IS THAT TEN DAYS OR MORE PRIOR TO THE DAY ON WHICH THE REQUEST FOR AN ORDER IS MADE, THE ATTORNEY GENERAL HAS TO HAVE BEEN SERVED BY THE NOTICE. THAT IS TO GIVE THE ATTORNEY GENERAL AN OPPORTUNITY TO DO SEVERAL THINGS, ONE OF WHICH IS TO SEEK TO PERSUADE THE COMMITTEE NOT TO APPLY FOR AN IMMUNITY ORDER.

THE SECOND WOULD BE: IF THE ATTORNEY GENERAL ANTICIPATED ANY PROSECUTION, TO BEGIN THE PROCESS OF SEALING HIS OWN EVIDENCE.

AT THE TIME THAT WE FILED THE APPLICATION, IT WAS LESS THAN TEN DAYS AFTER THE ATTORNEY GENERAL HAD BEEN SERVED. WE ATTACHED TO THE APPLICATION A LETTER FROM THE DEPARTMENT OF JUSTICE, WAIVING THE TEN-DAY PERIOD AND THE FURTHER PERIOD THAT THE ATTORNEY GENERAL MIGHT HAVE ASKED FOR A DELAY IN THE IMMUNITY ORDER.

THAT LETTER IS EXHIBIT F TO THE APPLICATION.

A NUMBER OF YEARS AGO THIS COURT AND THEN THE D.C. CIRCUIT, ON APPEAL, HAD OCCASION TO CONSIDER WHETHER THE TEN-DAY PROVISION WAS WAIVERABLE, AND THE ANSWER IN THE

OPINION WRITTEN BY JUDGE WRIGHT WAS CLEARLY THAT IT IS. IT IS A PERIOD THAT IS FOR THE BENEFIT OF THE DEPARTMENT OF JUSTICE, AND, THEREFORE, WAIVERABLE BY IT.

WE HAVE JUST BEEN PRESENTED WITH AN OPPOSITION FILED BY MR. BORDERS WHICH ASSERTS THAT THE WAIVER WAS INEFFECTIVE BECAUSE IT WAS NOT SIGNED PERSONALLY BY THE ATTORNEY GENERAL, BUT BY A DESIGNEE OF THE ATTORNEY GENERAL.

I SHOULD SAY TWO THINGS ABOUT THAT. ONE, IN THE CAMMISANO CASE, THAT WAIVER WAS SIGNED BY AN ASSISTANT ATTORNEY GENERAL AND NOT BY THE ATTORNEY GENERAL. THERE IS NO DOUBT THAT IT IS THE WAIVER OF THE DEPARTMENT OF JUSTICE.

SECONDLY, AND PERHAPS MORE IMPORTANTLY AND DISPOSITIVELY, THIS WAIVER IS DATED JUNE 9TH, AND NOTICE HAD BEEN RECEIVED BY THE ATTORNEY GENERAL ON JUNE 8TH. THE TEN-DAY PERIOD WOULD HAVE TAKEN US, LET'S SAY, TO JUNE 18TH, AND THIS IS NOW JUNE 26TH.

SO THAT, ALTHOUGH WE HAD OBTAINED THE WAIVER, ANTICIPATING AN EARLIER SUBMISSION TO THE COURT, IT IS NOW CLEARLY BEYOND THE TEN-DAY PERIOD, AND THERE WOULD BE NO WAIVER REQUIRED AT ALL.

THE COURT: DO YOU HAVE ANY INFORMATION AS TO WHETHER THE MATTER WAS BROUGHT TO THE PERSONAL ATTENTION OF THE ATTORNEY GENERAL?

MR. DAVIDSON: I DO NOT KNOW. WE HAVE FOLLOWED THE CUSTOMARY COURSE OF ACTION IN THESE MATTERS. WE ADDRESSED

THE NOTICE TO THE ATTORNEY GENERAL, AND THE NOTICE IS EXHIBIT D TO THE APPLICATION.

BY ARRANGEMENT WITH THE DEPARTMENT OF JUSTICE IN THIS AND MANY OTHER MATTERS, WE DELIVERED IT TO THE OFFICE OF LEGISLATIVE AFFAIRS AND HAVE ALWAYS LEFT IT TO THE DEPARTMENT TO DETERMINE HOW TO HANDLE IT WITHIN THE DEPARTMENT.

THE COURT: ALL RIGHT. THANK YOU.

MR. DAVIDSON: I WOULD JUST LIKE TO ADVISE THE COURT OF ONE THING. AS THE CASES INDICATE, THE COURT'S FUNCTION, OF COURSE, IS A LIMITED FUNCTION: TO DETERMINE WHETHER THESE PREREQUISITES HAVE BEEN FOLLOWED.

THE COMMITTEE HAS FILED THIS APPLICATION -- AND I DO THIS FOR THE INFORMATION OF THE COURT AND FOR MR. BORDERS -- WITHOUT HAVING MADE A FINAL DETERMINATION WHETHER MR. BORDERS WOULD BE CALLED AT THE HEARINGS, WHICH WILL START ON JULY 10TH.

HE IS OBVIOUSLY A PIVOTAL PERSON TO THIS ENTIRE STORY. THERE MAY BE TWO PEOPLE IN THE WORLD WHO KNOW FINALLY THE TRUTH OF WHAT HAPPENED, JUDGE HASTINGS AND MR. BORDERS.

THE HOUSE HAS NOT PLACED MR. BORDERS ON THE WITNESS LIST, AND MR. ANDERSON, WHO REPRESENTS JUDGE HASTINGS, HAS NOT PLACED HIM ON ANY WITNESS LIST TO DATE, BUT HAS RESERVED THE RIGHT TO CALL HIM.

THE COMMITTEE MIGHT DETERMINE ON ITS OWN TO CALL MR. BORDERS. IT HAS DECIDED THAT IT IS VERY IMPORTANT TO

ARRANGE FOR HIS TESTIMONY IN ADVANCE OF A FINAL DECISION, TO THE EXTENT THAT AN IMMUNITY ORDER WOULD CLEAR THE WAY TO RECEIVE HIS TESTIMONY, ONCE THE HEARINGS START IN JULY.

THANK YOU.

THE COURT: THANK YOU. IS THE UNITED STATES REPRESENTED?

MR. DAVIDSON: I UNDERSTAND THAT YOUR CHAMBERS DID NOTIFY THE DEPARTMENT OF JUSTICE.

THE COURT: WE DID. THEY ARE NOT PRESENT. VERY WELL.

MR. ROSIER.

MR. ROSIER: GOOD AFTERNOON, YOUR HONOR.

THE COURT: GOOD AFTERNOON, SIR.

MR. ROSIER: FOR THE RECORD, I AM MICHAEL ROSIER ON BEHALF OF WILLIAM BORDERS.

I HAVE FILED AN OPPOSITION TO THIS APPLICATION.

THE COURT: I HAVE NOT RECEIVED IT. COULD YOU HAND IT UP?

MR. ROSIER: I HAVE A COPY HERE. THE ORIGINAL HAS NOT BEEN FILED WITH THE CLERK. I JUST BROUGHT IT OVER AS I CAME TODAY.

THE COURT: ALL RIGHT.

MR. ROSIER: BUT, BASICALLY, AS MR. DAVIDSON CORRECTLY STATED, THE ROLE OF THE COURT AT THIS JUNCTURE IS SIMPLY TO DETERMINE THE PROPRIETY OF THIS APPLICATION, AND THERE ARE CASES THAT HOLD THAT THE COURT IS ESSENTIALLY A CHECK

POINT TO SCRUTINIZE AT THIS POINT IN TIME THE EVIDENCE THAT IS OF RECORD AND TO DETERMINE THE PROCEDURAL PROPRIETY AND THE JURISDICTIONAL PROPRIETY OF ALLOWING THIS IMMUNIZATION TO TAKE PLACE.

PROCEDURALLY, AS MR. DAVIDSON POINTED OUT, THERE ARE TWO THINGS THAT MUST BE COMPLIED WITH, THE FIRST OF WHICH WE HAVE NO PROBLEM WITH, THAT BEING THE TWO-THIRDS OF THE COMMITTEE, WHICH IS FOUND UNDER 28 U.S.C. 6005, SUBSECTION (2).

SUBSECTION (3), WHICH IS THE TEN-DAY NOTICE, IS THE PROCEDURAL IMPEDIMENT THAT WE SEE AT THIS POINT IN TIME, YOUR HONOR.

MR. DAVIDSON POINTED OUT, AND AS HE INDICATED IN HIS MEMORANDUM, THAT THE ATTORNEY GENERAL MAY WAIVE THIS TEN-DAY REQUIREMENT. HOWEVER, THE EXHIBIT F, WHICH WAS REFERRED TO BY MR. DAVIDSON AND WHICH IS OUR EXHIBIT C, WAS SIGNED, BUT NOT BY THE ATTORNEY GENERAL, AND NOT BY AN ASSISTANT ATTORNEY GENERAL, BUT BY A PERSON BY THE NAME OF JOHN MACKEY FOR CAROL T. CRAWFORD, ASSISTANT ATTORNEY GENERAL.

AT THIS POINT IN TIME, WITH THE RECORD THAT IS BEFORE THE COURT, I AM NOT ABLE TO ASCERTAIN AS TO WHETHER THIS MR. MACKEY IS AN ASSISTANT ATTORNEY GENERAL OR WHETHER HE IS AN ATTORNEY, WHETHER HE IS A DESIGNEE, AS ALLEGED IN THIS APPLICATION. NONE OF THESE MATTERS ARE CLEAR, AND

I THINK THIS IS A PROCEDURAL HURDLE, WHICH IS OF A NATURE THAT THE COURT HAS TO ADDRESS TODAY.

IT IS OUR POSITION THAT, IN THE ABSENCE OF AN AFFIRMATIVE SHOWING THAT THIS IS AN APPROPRIATE DESIGNEE, THAT THIS APPLICATION IS NOT WELL FOUNDED AND SHOULD BE DISMISSED.

THE CASE, WHICH IS CITED AND WHICH WE CITE IN SUPPORT OF OUR CONTENTIONS, IS FOUND ON PAGE 6. IT IS THE CASE OF THE UNITED STATES V. GIORDANO.

THIS ARISES OUT OF AN ANALOGOUS SITUATION UNDER TITLE III, WHICH INVOLVED A WIRETAP CASE WHEREIN THE DESIGNEE, IF THE COURT IS FAMILIAR WITH THE CASE, WAS ALLOWED TO AUTHORIZE A WIRETAP, WHICH WE BELIEVE TO BE ANALOGOUS TO THAT CASE.

THE EVIDENCE WHICH WAS RECEIVED AS A RESULT OF THAT WIRETAP, WHICH WAS NOT AUTHORIZED BY AN APPROPRIATE DESIGNEE, WAS SUPPRESSED. I FEEL THAT IS AN APPROPRIATE CASE. I THINK IT IS ON POINT WITH THE ISSUES THAT ARE BEFORE THE COURT, AND WE WOULD ASK THE COURT TO DISMISS THIS APPLICATION FOR IMMUNIZING WILLIAM BORDERS.

THE COURT: MR. DAVIDSON, I DID REMEMBER THE GIORDANO CASE, AND I HAD NOT FOCUSED ON THE FACT THAT MR. MACKIE IS THE SIGNER, AND I DON'T KNOW WHO HE IS.

WOULD IT NOT BE PRUDENT TO HAVE THEM PULL UP THEIR SOCKS AND FILE A CORRECT WAIVER?

MR. DAVIDSON: BUT NO WAIVER IS REQUIRED, YOUR HONOR, BECAUSE WE ARE WELL PAST THE TEN-DAY PERIOD.

THE COURT: THAT IS NOT WHAT THE STATUTE SAYS. IT SAYS WITHIN TEN DAYS --

MR. DAVIDSON: PRIOR TO THE REQUEST FOR THE APPLICATION.

THE COURT: -- PRIOR TO THE REQUEST. I AM NOT A TECHNICAL PERSON, AND I DON'T LIKE TO LET FORM DOMINATE SUBSTANCE, BUT SOMETIMES IT IS WORTH AN OUNCE OF PREVENTION HERE TO KEEP FROM HAVING A SUPREME COURT CASE GROW OUT OF THIS.

MR. DAVIDSON: YOUR HONOR, I DO BELIEVE THAT NO SUPREME COURT CASE WOULD ARISE OUT OF THIS. IT IS TEN DAYS OR MORE PRIOR TO THE DAY ON WHICH THE REQUEST FOR THE ORDER WAS MADE.

THE COURT: YES.

MR. DAVIDSON: AND WE HAD FILED IT EARLIER, BUT WE ARE REQUESTING IT TODAY. I CAUSED THE SERVICE ON THE OFFICE OF LEGISLATIVE AFFAIRS, WHICH IS OUR METHOD, ASKED FOR BY THE DEPARTMENT OF JUSTICE, FOR SERVING THE ATTORNEY GENERAL.

I HAVE MY NOTICE AND MY CERTIFICATE OF THAT NOTICE. THE WAIVER IS A TOTALLY MOOT POINT AT THIS TIME, BECAUSE THAT SERVICE OCCURRED ON JUNE 8TH. IT IS CLEAR THAT IT WAS RECEIVED. YOUR OFFICE HAS ALSO NOTIFIED THE DEPARTMENT OF JUSTICE.

THE COURT: WELL, THAT WAS BY TELEPHONE. OUR ORDER WAS SENT OUT ON THE 20TH. WE FILED THE ORDER THAT CALLED

FOR THIS HEARING ON THE 20TH. I JUST DO NOT THINK IT IS WORTH IT TO GIVE SOMEBODY AN ISSUE ON APPEAL.

MR. DAVIDSON: WHAT WOULD THE COURT SUGGEST?

THE COURT: I SUGGEST THAT I HOLD THIS MATTER UNDER ADVISEMENT, TO GIVE YOU AN OPPORTUNITY TO PERFECT THE WAIVER SOUGHT FROM THE ATTORNEY GENERAL. I DON'T KNOW BY WHAT METHOD, BUT AT LEAST THE SIGNATURE OF A PRESIDENTIAL APPOINTEE.

MR. DAVIDSON: WE NO LONGER SEEK A WAIVER. WE NO LONGER REQUIRE A WAIVER.

THE COURT: WELL, THAT IS WHAT YOU SAY, BUT I AM JUST TELLING YOU THAT THE STATUTE, AT LEAST ON ITS FACE, SUGGESTS THAT THERE IS A TEN-DAY PERIOD HERE. I KNOW IT IS ALL FOR THE BENEFIT OF THE ATTORNEY GENERAL, BUT THESE ARE THE KINDS OF FLYSPECKS THAT DERAIL WELL-INTENTIONED LEGAL SOLUTIONS.

MR. DAVIDSON: AS YOUR HONOR KNOWS FROM OTHER CASES, WE HAVE -- AND, CERTAINLY, IF IT IS YOUR WISH, WE WILL DO THIS, BUT THIS WAIVER WAS ONLY FOR THE LIMITED PURPOSE OF ALLOWING THE APPLICATION TO BE BROUGHT ON BEFORE YOU OR ANY OTHER JUDGE OF THE COURT WITHIN THE TEN-DAY PERIOD FROM JUNE 8TH.

THE COURT: AND YOU DID THAT, AND THAT IS WITHOUT THE WAIVER.

NOW, I UNDERSTAND ALL OF THE ARGUMENTS ON THE MERITS WHY THIS IS POSSIBLY AN UNNECESSARY PRECAUTION, BUT I WOULD

FEEL MORE COMFORTABLE IF YOU OBTAIN FROM THE UNITED STATES A WAIVER SIGNED, IF NOT BY THE ATTORNEY GENERAL PERSONALLY, AT LEAST BY A PRESIDENTIAL APPOINTEE OR AT LEAST BY SOMEONE WHO CAN BE IDENTIFIED. I DON'T KNOW WHO THIS IS.

MR. DAVIDSON: IF WE ARE NO LONGER SEEKING A WAIVER BECAUSE THE TEN-DAY PERIOD HAS ELAPSED, AND THE SECOND PART OF THAT LETTER WAS SIMPLY TO ADVISE THE COURT THAT AT THE TIME OF THIS APPLICATION, TODAY, NO ONE FROM THE DEPARTMENT OF JUSTICE WOULD APPEAR AND ASK FOR A 20-DAY PERIOD, IT IS NOT A LIMITATION ON US, BUT IT IS SIMPLY A WAY OF ESTABLISHING THE RECORD, WHICH IS ALSO ESTABLISHED BY THE ABSENCE OF ANYONE FROM THE DEPARTMENT --

THE COURT: YOU GET SOMEBODY TO RATIFY OR AT LEAST VERIFY TO ME WHO MR. MACKEY IS.

MR. DAVIDSON: AND IS IT SIMPLY THAT THEY, IN FACT --

THE COURT: I AM JUST LOOKING AT THE GIORDANO CASE.

MR. DAVIDSON: WELL, THE GIORDANO CASE --

THE COURT: I CAN DISTINGUISH IT, BUT NOBODY ANTICIPATED IT, EITHER.

MR. DAVIDSON: (CONTINUING) -- WAS: WHO HAD AUTHORITY TO ASK FOR THE APPLICATION.

THE COURT: YES.

MR. DAVIDSON: AND THAT IS RESOLVED BY THE APPLICATION OF THE COMMITTEE.

I MEAN WE CAN OBTAIN FROM THE DEPARTMENT OF JUSTICE, IF IT WOULD RESOLVE THE COURT'S PROBLEM, SOME OTHER LETTER THAT, IN FACT, THIS APPLICATION, THIS NOTICE, THE JUNE 8TH NOTICE, WAS RECEIVED BY AN ASSISTANT ATTORNEY GENERAL.

I AM ONLY RELUCTANT TO ASK THEM FOR A WAIVER, SINCE WE NO LONGER ARE ASKING THEM FOR A WAIVER.

THE COURT: WELL, WHY DON'T YOU LET THEM TELL ME ON THE RECORD, IN ADDITION, THAT THEY HAVE NO OPPOSITION TO THE IMMUNITY.

MR. DAVIDSON: WELL, THEY HAVE NEVER TAKEN THE POSITION THAT THEY HAVE ANY STANDING TO OBJECT TO THE IMMUNITY. I DON'T KNOW WHETHER THEY WOULD BECAUSE THEY DON'T --

THE COURT: IF THEY SAY THAT, THAT WOULD BE FINE, TOO; JUST SO THEY ARE ESTOPPED.

MR. DAVIDSON: IF THE ASSISTANT IS NOT AVAILABLE, WOULD SOME CLARIFICATION AS TO WHO THE SIGNER OF THE LETTER IS BE SUFFICIENT?

THE COURT: WELL, THERE MUST BE SOMEBODY THERE WHO IS A PRESIDENTIAL APPOINTEE WHO CAN SIGN A LETTER IN A MATTER OF THIS SIGNIFICANCE.

MR. DAVIDSON: WE WILL ARRANGE TO HAVE --

THE COURT: WHY DON'T YOU FILE THAT.

MR. DAVIDSON: (CONTINUING) -- THAT FILED. THEN WE WOULD ASK THE COURT FOR THE EARLIEST POSSIBLE DISPOSITION.

THE COURT: I WILL ACT ON IT VERY PROMPTLY. IF YOU GET THAT BACK TODAY, IT WILL BE DEALT WITH TODAY.

MR. DAVIDSON: THANK YOU.

THE COURT: IS THERE ANYTHING FURTHER, MR. ROSIER?

MR. ROSIER: NOTHING FURTHER, JUDGE.

THE COURT: THANK YOU VERY MUCH.

MR. ROSIER: THANK YOU.

MR. DAVIDSON: THANK YOU, SIR.

THE COURT: NICE TO SEE YOU ALL.

(WHEREUPON, THE COURT CONCLUDED THE HEARING.)

- - - - -

REPORTER'S CERTIFICATE

I, THOMAS DOURIAN, CERTIFY THAT THE FOREGOING IS THE OFFICIAL TRANSCRIPT OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER; AND THAT IT IS COMPLETE AND ACCURATE, TO THE BEST OF MY KNOWLEDGE AND ABILITY.

Thomas Dourian

OFFICIAL REPORTER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST
JUDGE ALCEE L. HASTINGS

The United States Senate
Washington, D.C. 20510,

Applicant.

Misc. No. 89-129 (LFO)

RECEIVED
JUN 27 10 49 AM
JAMES F. DAVEY, CLERK
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

NOTICE OF FILING

Pursuant to the Court's request at the hearing on June 26, 1989, applicant submits for filing a copy of the June 26, 1989 letter from Carol T. Crawford, Assistant Attorney General for the Office of Legislative Affairs, to Michael Davidson, Senate Legal Counsel, confirming that "[t]he Department of Justice has no objection to the proposed order to compel the testimony of William A. Borders, Jr., and hereby waives the provisions of 18 U.S.C. Section 6005(b)(3) and (c)." Ms. Crawford is a presidential appointee. See 135 Cong. Rec. S5753, 5755 (daily ed. May 18, 1989)(record of Senate confirmation). Attached to Ms. Crawford's June 26, 1989 letter are two letters which she attached to that letter, namely, a letter to Ms. Crawford, dated June 8, 1989, from Elaine W. Stone, counsel to the Impeachment Trial Committee, and the formal notification to the Attorney General, which was also dated and delivered on June 8, 1989.

Respectfully submitted,

Michael Davidson
Senate Legal Counsel

Ken U. Benjamin, Jr.
Deputy Senate Legal Counsel

Morgan J. Frankel
Assistant Senate Legal Counsel

642 Hart Senate Office Building
Washington, D.C. 20510-7250
(202) 224-4435

Counsel for Applicant

Dated: June 27, 1989

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 26, 1989

Michael Davidson, Esquire
Senate Legal Counsel
Room 642
Senate Hart Office Building
Washington, D.C. 20510-7250

RECEIVED JUN 29 1989

Dear Mr. Davidson:

This is in response to your notice dated June 8, 1989, to Attorney General Thornburgh of the intention of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings to apply for an immunity order for William A. Borders, Jr.

The Department of Justice has no objection to the proposed order to compel the testimony of William A. Borders, Jr. and hereby waives the provisions of 18 U.S.C. Section 6005(b)(3) and (c).

By letter of June 9, 1989, the Department of Justice previously responded to your inquiry under the signature of John P. Mackey, Deputy Assistant Attorney General in this office, who was authorized to sign in my absence.

However, to alleviate any concerns the court might have on the Department's views as expressed in the June 9th letter, I again state those views herein.

Sincerely,

Carol T. Crawford
Assistant Attorney General

cc: Elaine W. Stone
Impeachment Trial Committee
(On the Articles Against
Judge Alcee L. Hastings)
Room 902D, Hart Senate Office Bldg.
Washington, D.C. 20510

JEFF BINGAMAN, NEW MEXICO, CHAIRMAN
ARLEN SPECTER, PENNSYLVANIA, VICE CHAIRMAN
PATRICK J. LEAHY, VERMONT
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CHRISTOPHER S. BOND, MISSOURI
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United States Senate
IMPEACHMENT TRIAL COMMITTEE
(ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS)
HART SENATE OFFICE BUILDING, ROOM SH-902D
WASHINGTON, DC 20510

June 8, 1989

Carol Crawford, Esq.
Assistant Attorney General
Office of Legislative Affairs
Room 1603
United States Department of Justice
Washington, D.C. 20530

Dear Ms. Crawford:

Enclosed is a notice of the intention of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings to apply for an immunity order for William A. Borders, Jr.

The committee has been in touch with Edgar Brown in the Witness Immunity Unit concerning this witness. The committee would like to be able to present its immunity application to the district court as soon as possible. We would therefore appreciate your early advice whether the Attorney General would be willing to waive his statutory right to a ten-day waiting period between this notification and the filing of the committee's application and his right to seek a twenty-day deferral of the issuance of an order.

Thank you for your assistance. Please let me know if there is anything that I can do in this matter.

Sincerely,

Elaine W. Stone

Elaine W. Stone

Enclosure

cc: Mr. Edgar Brown

MICHAEL DAVIDSON
COUNSEL
KEN U. BENJAMIN, JR.
MORGAN J. FRANKEL
ASSISTANT COUNSEL

PHONE: (202) 224-4435
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United States Senate
OFFICE OF SENATE LEGAL COUNSEL
WASHINGTON, DC 20510-7250

NOTICE OF INTENTION TO REQUEST ORDER CONFERRING IMMUNITY

TO: The Honorable Dick Thornburgh
The Attorney General of the United States
Washington, D.C. 20530

Please take notice that the undersigned, as representative of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, will request the United States District Court for the District of Columbia, pursuant to 18 U.S.C. § 6005 and 2 U.S.C. §§ 288b(d) and 288f, to issue an order immunizing from use in prosecutions the testimony of, and other information provided by, William A. Borders, Jr., at proceedings of the committee.

Michael Davidson
Michael Davidson
Senate Legal Counsel
642 Senate Hart Office Building
Washington, D.C. 20510
(202) 224-4435

Dated: June 8, 1989

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
JUN 27 1989
CLERK, U.S. DISTRICT COURT,
DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST
JUDGE ALCEE L. HASTINGS

The United States Senate
Washington, D.C. 20510,

Applicant.

Misc. No. 89-129

ORDER

Upon consideration of the application by the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, and upon determining that the procedural requirements set forth in 18 U.S.C. § 6005 have been satisfied, it is, this 27th day of June, 1989,

ORDERED That William A. Borders, Jr., may not refuse to testify, and provide other information, at proceedings of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, on the basis of his privilege against self-incrimination, and it is

FURTHER ORDERED That no testimony or other information compelled under this Order (or any information directly or indirectly derived from such testimony or other information) may be used against him in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this Order.

Louis F. Oberdorfer
United States District Judge

United States District Court
for the District of Columbia
A TRUE COPY
JAMES E. DAVEY, CLERK,
By M. Keller
Deputy Clerk

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[illegible]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5189

IN THE MATTER OF THE APPLICATION OF THE IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS

APPEAL OF WILLIAM A. BORDERS, JR.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION OF APPELLEE IMPEACHMENT TRIAL COMMITTEE TO DISMISS OR, IN THE ALTERNATIVE, TO SUMMARILY AFFIRM

The Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings ("Impeachment Trial Committee" or "Committee") moves to dismiss the appeal of William A. Borders, Jr., from the June 27, 1989 order of the district court (per Oberdorfer, J.) that Mr. Borders "may not refuse to testify, and provide other information, at proceedings of [the Committee], on the basis of his privilege against self-incrimination." (Exh. 1). In the alternative, the Committee moves for summary affirmance of the district court's order.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 6002. Immunity generally

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to --

* * *

(3) either House of Congress ... or a committee ... of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. § 6005. Congressional proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before either House of Congress, or any committee ... of either House, ... a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that --

* * *

(2) in the case of a proceeding before a committee ... of either House of Congress ... the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and

(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.

> (c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

STATEMENT

The Impeachment Trial Committee was appointed, pursuant to Senate Resolution 38 of the 101st Congress (Exh. 2) and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials (Exh. 3), to receive and report to the Senate evidence on the articles of impeachment against Judge Hastings. Article I alleges that "[f]rom some time in the first half of 1981 and continuing through October 9, 1981, Judge Hastings and William Borders, then a Washington, D.C. attorney, engaged in a corrupt conspiracy to obtain $150,000 from defendants in United States v. Romano, a case tried before Judge Hastings, in return for the imposition of sentences which would not require incarceration of the defendants."1/ Articles II-VI and VIII-IX also specifically refer to Mr. Borders. (Exh. 4).

The Committee voted on June 7, 1989, pursuant to 2 U.S.C. §§ 288b(d) and 288f, to direct the Senate Legal Counsel "to apply for a court order immunizing from use in prosecutions

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1/ Exh. 4. Mr. Borders was convicted in 1982 of conspiring with Judge Hastings to solicit a bribe. United States v. Borders, 693 F.2d 1318 (11th Cir. 1982), cert. denied, 461 U.S. 905 (1983). Judge Hastings was acquitted in a separate trial in 1983.

the testimony of, and other information provided by, William A. Borders, Jr., at proceedings of the Committee."[2] The June 7, 1989 resolution was approved by nine of the twelve members of the Committee, see Exh. 5, and satisfies the requirement in 18 U.S.C. § 6005(b)(2) that "in the case of a proceeding before a committee ... of either House of Congress ... the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee." 18 U.S.C. § 6005(b)(2).

On June 8, 1989, "the Attorney General was served with notice of an intention to request the order." 18 U.S.C. § 6005(b)(3); see Exh. 6 (notice) and Exh. 7 (certificate of service). On June 9, 1989, a letter signed by John Mackey for Carol Crawford, the Assistant Attorney General for Legislative Affairs, notified the Committee as follows:

> This is in response to your notice dated June 8, 1989, to Attorney General Thornburgh of the intention of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings to apply for an immunity order for William A. Borders, Jr.
>
> The Department of Justice has no objection to the proposed order to compel the testimony of William A. Borders, Jr. and hereby waives the provisions of 18 U.S.C. Section 6005(b)(3) and (c).

---

[2] Exh. 5. During the House impeachment proceedings Mr. Borders asserted his fifth amendment privilege, but no immunity was sought. H.R. Rep. No. 810, 100th Cong., 2d Sess. 11 (1988).

(Exh. 8). Section 6005(b)(3) provides that a congressional committee's notice of intention to apply for an immunity order should be served "ten days or more prior to the day on which the request for such an order [is] made." 18 U.S.C. § 6005(b)(3). The Department's waiver of that requirement allowed the Committee to apply for the immunity order without waiting for the full ten-day period to lapse. As will be described below, the Department of Justice's authority to "waive the 10-day notice requirement" has been upheld by this Court as "consonant with congressional intent and common sense."[3]

On June 14, 1989, the Committee filed in the district court its ex parte application, see pages 8-9 infra, for an immunity order.[4] By an order dated June 19, 1989, the district court set the application down for hearing on

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[3] In re Application of United States Senate Permanent Subcommittee on Investigations (Cammisano), 655 F.2d 1232, 1236-38 (D.C. Cir.), cert. denied, 454 U.S. 1084 (1981). The Department's letter also waived the authority of the Attorney General to obtain a twenty-day deferral of the issuance of an immunity order. 18 U.S.C. § 6005(c). The Department was able to respond quickly to the Committee's formal notification to the Attorney General of the Committee's intention to apply for an immunity order for Mr. Borders because Committee counsel had provided advance notification of the Committee's possible interest in immunizing Mr. Borders to the Witness Immunity Unit in the Criminal Division by a letter dated May 22, 1989.

[4] We utilized the Department's waiver to accelerate the filing of the immunity application in order to be prepared in the event that the Committee, at the request of the parties or on its own initiative, summoned Mr. Borders to a pretrial examination in June. However, Mr. Borders was not summoned for a pretrial examination. The Committee's evidentiary hearings began on July 10, 1989.

June 26, 1989. The Department of Justice, counsel for the parties to the impeachment (the House and Judge Hastings), and counsel for Mr. Borders were notified; we provided each with copies of our application.

The Department of Justice, the House, and Judge Hastings did not appear at the June 26, 1989 hearing. Mr. Borders did appear and, through counsel, opposed the Committee's application. Arguing that the Department's June 9, 1989 letter did not identify the position of John Mackey, who had signed the letter for Assistant Attorney General Carol Crawford, Mr. Borders contended that the letter was insufficient to waive the 10-day notice provision in 18 U.S.C. § 6005(b)(3). Although opposing the Committee's application, Mr. Borders did not move to intervene in the immunity proceedings, and the district court entered no order permitting intervention.

In response, we argued that the question of the Department's waiver of the ten-day provision was academic because the passage of eighteen days between the June 8, 1989 notification to the Attorney General, and June 26, 1989, when the district court heard the application, meant that no waiver was necessary. Nevertheless, in accord with Judge Oberdorfer's recommendation that we file a letter signed by a presidential appointee, on June 27, 1989 we filed a June 26, 1989 letter signed by Carol Crawford, the Assistant Attorney General for Legislative Affairs.

Ms. Crawford's letter reiterated the first two paragraphs of the letter that John Mackey had signed on June 9, 1989, and added:

> By letter of June 9, 1989, the Department of Justice previously responded to your inquiry under the signature of John P. Mackey, Deputy Assistant Attorney General in this office, who was authorized to sign in my absence.
>
> However, to alleviate any concerns the court might have on the Department's views as expressed in the June 9th letter, I again state those views herein.

(Exh. 9). The district court then, "determining that the procedural requirements set forth in 18 U.S.C. § 6005 have been satisfied," issued the immunity order. (Exh. 1).

Mr. Borders filed a notice of appeal on July 6, 1989. (Exh. 10). On July 24, 1989, Mr. Borders appeared before the Committee pursuant to its subpoena.[5] He refused to answer all questions. Although the immunity order was communicated to him, Mr. Borders, through counsel, declined to answer the Committee's questions because of his pending appeal.[6] Mr. Borders continued to refuse to answer the Committee's questions after the Committee overruled his objections and directed him to answer. Mr. Borders has been directed to appear again before the Committee on July 27, 1989, at 4 p.m.

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[5] The Committee subpoenaed Mr. Borders on its own initiative after it became clear that neither the House nor Judge Hastings would call him as a witness, in spite of his central role in this matter. Although the Senate is not bound by the Federal Rules of Evidence, the Committee has utilized the rules for guidance. Rule 614 provides that "[t]he court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called." This rule draws in large part on Justice Frankfurter's observation that "[a] trial is not a game of blind man's buff; and the trial judge -- particularly in a case where he himself is the trier of the facts upon which he is to pronounce the law -- need not blindfold himself by failing to call an available vital witness simply because the parties, for reasons of trial tactics, choose to withhold his testimony." Johnson v. United States, 333 U.S. 46, 54 (1948)(dissenting in part).

ARGUMENT

I.

THE APPEAL SHOULD BE DISMISSED

The appeal should be dismissed for three reasons: (1) Mr. Borders did not become a party to the ex parte proceeding below and therefore may not appeal from the district court's order; (2) the district court's order is not appealable; and (3) the interest asserted by Mr. Borders in his memorandum in the district court is an interest that belongs solely to the Department of Justice, and Mr. Borders is not aggrieved.

A. Mr. Borders, Who Was Heard But Did Not Intervene As a Party Below, May Not Appeal

An immunity application may be filed ex parte. The immunity statute contains no requirement that a potential witness be notified about a prospective grant of immunity. Ryan v. Commissioner of Internal Revenue, 568 F.2d 531, 539-40 (7th

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[6] Mr. Borders' counsel also asserted other objections, such as double jeopardy and the prohibition against cruel and unusual punishment, as grounds not to testify. Those objections are not part of the pending appeal.

Cir. 1977), cert. denied, 439 U.S. 820 (1978). "[A]n immunity order is effectively an exchange of one safeguard for another," id. at 539, with a witness receiving a commitment that his testimony will not be used against him in return for relinquishing his right to be silent. Thus, "[a]s a matter of constitutional law, the witness suffers no detriment from an immunity order and therefore has no right to be heard." Id.; accord United States v. Pacella, 622 F.2d 640, 643-44 (2d Cir. 1980); United States v. Leyva, 513 F.2d 774, 776 (5th Cir. 1975). The "ministerial" nature of the district court's limited function of "only scrutiniz[ing] the record to ascertain that a request for immunity complies with the procedural and jurisdictional requirements of the statute" means that "there is little need for an adversary hearing before the court approves a request for immunity." Ryan, 568 F.2d at 540.

"[N]othing," however, "in the statute bars the court or [the applicant for the immunity order] from notifying the witness, or hearing any objections." Id. (citation omitted). Here, the district court, on examining the application when it was filed, concluded that everyone who might be interested -- the Department of Justice, the House of Representatives, Judge Hastings, and Mr. Borders -- should have the opportunity to be heard, and set the application down for a hearing. Mr. Borders appeared and stated an objection to the immunity application, but did not move to intervene as a party to the immunity proceeding. Thus, in contrast to In re McElrath, 248 F.2d 612

(D.C. Cir. 1957)(en banc), where the witnesses moved unsuccessfully in the district court "to intervene as defendants," id. at 615, and then appealed from that ruling as well as the merits, Mr. Borders sought only to be heard. The district court heard Mr. Borders' counsel, and asked the Committee's counsel to obtain a further letter from the Department in order to remove the question that had been raised by Mr. Borders' counsel. The district court was not asked to, and did not, issue an order granting Mr. Borders party status. As a nonparty, Mr. Borders cannot appeal. See United States v. LTV Corporation, 746 F.2d 51, 53 (D.C. Cir. 1984)(per curiam)("'It has long been settled that one who is not a party to a record and judgment is not entitled to appeal therefrom.'")(quoting United States v. Seigel, 168 F.2d 143, 144 (D.C. Cir. 1948)).7/

B. The Immunity Order Is Not Appealable

An immunity order for congressional testimony under 18 U.S.C. §§ 6002 and 6005 is interlocutory. The order may be issued before there is any certainty that an individual will be called as a witness and, if called, would assert his or her testimonial privilege. See id. § 6005(a) (order may be issued

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7/ As the Court noted in LTV, and as is true here, "[t]here are indeed exceptions to the general rule but none is relevant to this appeal," because the district court order "does not foreclose other means of challenging" immunization, id. at 53-54, for example, in defense of subsequent enforcement or contempt proceedings. See id. at 53, n.5 (citing exceptions for derivative suits, class actions, and other circumstances not pertinent here).

"[i]n the case of any individual who has been or may be called to testify") (emphasis added); Cammisano, 655 F.2d at 1237 ("[b]y its very terms the section permits District Courts to issue an immunity order before the witness has appeared before the congressional body"). After an immunity order is issued by a district court, it is still not certain that the order ever will be communicated to the potential witness. The subject of the immunity order must be called and "refuse[], on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before ... a committee ... of either House." 18 U.S.C. § 6002; see Cammisano, 655 F.2d at 1237 ("an immunity order issued under Section 6005 is not effective until the witness refuses to answer questions, although the District Court may have issued the order prior to the witness' appearance"). Even that step is preliminary to the effectiveness of the order, because the order does not oblige the witness to testify until the presiding officer at the hearing "communicates" the order to the witness. Id. [8]

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[8] Although obtained in advance of the witness' appearance ... the order of immunity only become[s] effective when (1) the witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information and (2) "the person presiding over the proceeding communicates to the witness" the district court order compelling such testimony or information. 18 U.S.C. § 6002.

In re Grand Jury Proceedings (Appeal of John Doe), 872 F.2d 5, 8 (1st Cir. 1989)(emphasis added).

The Supreme Court has reaffirmed "the continued validity of our holding in Cobbledick v. United States, 309 U.S. 323 (1940), that one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey." United States v. Ryan, 402 U.S. 530, 532 (1971). The grant of an immunity order, which may be issued preliminarily to a subpoena and which may never be communicated to a witness, provides even less of an occasion for an appeal than the denial of a motion to quash a subpoena.[9/]

In In re McElrath, 248 F.2d 612, this Court reversed the grant by the district court of applications by a Senate subcommittee for immunity orders under Pub. L. No. 600, 68 Stat. 745 (1954)(amending former 18 U.S.C. § 3486). That statute has since been replaced by the provisions of the Organized Crime Control Act of 1970, that form the current immunity statute, 18 U.S.C. §§ 6001-6005 (1982).[10/] In McElrath, the district court

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[9/] The fact that, since the issuance of the order, the Committee subpoenaed Mr. Borders, he appeared but refused to testify, and the immunity order was communicated to him, does not alter the lack of jurisdiction over Mr. Borders' appeal from the bare issuance of the immunity order.

[10/] The 1970 immunity statute repealed all of the prior statutory immunity provisions, which numbered "at least 50." Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270, 1273 (D.D.C. 1973); see id. at 1274-78 (describing legislative history of 1970 immunity statute).

had "ordered each of the appellants to 'appear as a witness before the said Internal Security Subcommittee at a time and place to be designated by the said Subcommittee, and then and there testify or produce evidence as lawfully required by the said Subcommittee.'" 248 F.2d at 615. This Court concluded that, under the terms of the older statute, immunity could not be granted to a prospective witness. Id. at 616 ("[t]he orders ... requiring appellants to testify are invalid because premature").

McElrath does not support the appealability of the district court's immunity order in this case. The order in McElrath required the witnesses to "appear" before the subcommittee in accordance with the provision of the former congressional immunity statute that authorized "an order of the United States district court ... requiring [a witness] to testify or produce evidence." 68 Stat. 745. Judge Oberdorfer's order under the 1970 immunity statute that Mr. Borders "may not refuse to testify ... on the basis of his privilege against self-incrimination," does not require him to "appear" before the Impeachment Trial Committee. The requirement that Mr. Borders "appear" arises from the Committee's July 19, 1989 subpoena to him, which might come before the district court if the Committee seeks its enforcement, but is not involved in this proceeding and is not currently subject to judicial challenge. See Eastland v. United States Servicemen's Fund, 408 U.S. 491, 511 (1975). Therefore, whatever vitality McElrath might have for a hypothetical statute directing a witness to appear before a congressional committee with immunity,[11] the grant of immunity alone under the present immunity statute, which is contingent upon further action by the Committee, is interlocutory and unappealable.

C. Mr. Borders Has No Personal Stake in the Objection Which He Raised in the District Court

The claim which Mr. Borders is asserting, that the Department of Justice did not use a proper official in waiving the period for its advance notice of the filing of an immunity application, involves a provision that was never intended to benefit a potential witness. Rather, as this Court has held, the ten-day notice provision "was plainly intended to benefit solely the Department of Justice." Cammisano, 655 F.2d at 1236 (emphasis in opinion). The purpose of the notification provision is to "provide[] the Department of Justice with '"time" to

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[11] Four judges of this Court concurred in an opinion stating that the witness should have been permitted to intervene to be heard on the procedural regularity of the subcommittee's application, but beyond intervention "'[w]hatever right he may have requires no further protection ... until the witness chooses to disobey and is committed for contempt.'" Id. at 617 (Burger, J.)(citing Cobbledick, 309 U.S. at 328). Two other circuits have held that immunity orders are not appealable under Cobbledick. See Ullmann v. United States, 350 U.S. 422, 425 (1956) (noting dismissal by Second Circuit on authority of Cobbledick of appeal from immunity order in advance of contempt conviction); In re Grand Jury Investigation (Appeal of Stanford Frank, Witness), 427 F.2d 714 (3d Cir. 1970) (appeal dismissed as not final on the basis of Cobbledick), and 317 F. Supp. 792, 794 (E.D. Pa. 1970) (explaining on remand that Third Circuit had held that order granting immunity was "interlocutory and hence non-appealable").

"lobby" for a change of mind' on the part of the congressional committee should the Attorney General object to the grant of immunity." Id. (citation omitted).[12] Mr. Borders' appeal should be dismissed because he is "raising matters in which [he] has no legitimate interest." United States Catholic Conference v. Abortion Rights Mobilization, Inc., 108 S.Ct. 2268, 2271 (1988).

II.

ALTERNATIVELY, THE ORDER OF THE DISTRICT COURT SHOULD BE SUMMARILY AFFIRMED

In the event that the merits of this appeal should be reached, this appeal meets this Court's requirements for summary affirmance. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 298 (D.C. Cir. 1987)(summary affirmance appropriate where "no benefit will be gained from further briefing and argument").

As indicated above, this Court has held that the ten-day notice provision in the immunity statute is for the sole benefit of the Department of Justice. The Department of Justice's interest in prosecuting Mr. Borders in connection with the alleged conspiracy to bribe Judge Hastings was satisfied by Mr. Borders' conviction in 1982. Following his conviction, the

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[12] A second purpose of the 10-day notice requirement, and the purpose of the 20-day deferral power, is to "give[] the Attorney General 'an opportunity to insulate from the immunity grant any incriminating data already in his files prior to the witness' testimony.'" Id. (citation omitted).

Department itself obtained a use immunity order for Mr. Borders' testimony before a grand jury that was investigating another bribery matter concerning Judge Hastings. In Re: Grand Jury Proceedings, Grand Jury 81-1 (Mia.) (William A. Borders, Jr.), Order of July 26, 1982 (S.D. Fla.).[13] The Department was given advance notification that the Committee was considering an application for an immunity order in this matter, and it was prepared to act quickly when formal notification was given to the Attorney General on June 8, 1989.

The Department has formal designations of authority of those Assistant Attorney Generals who are authorized to apply to the district courts for deferrals of up to twenty days of the issuance of immunity orders for congressional testimony. 28 C.F.R. § 0.176 (1988). When the Department decides not to seek any of the limited delay that the immunity statute authorizes, the Congress may be notified of that determination by the Assistant Attorney General for Legislative Affairs, who has responsibility for "[m]aintaining liaison between the Department and Congress." Id., § 0.27. Assistant Attorney General Carol Crawford's letter of June 26, 1989, ratifying her deputy's letter of June 9, 1989, establishes beyond question that a responsible Department official communicated to the

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[13] Mr. Borders refused to testify and was held in civil contempt and incarcerated for the duration of the inquiry, which we believe was for a period of between four and six weeks.

Congress that the Department had no interest in any further delay in the filing of the Committee's immunity application.

In the district court, Mr. Borders argued that United States v. Giordano, 416 U.S. 505 (1974), establishes by analogy a requirement that waiver of the notification period under the immunity statute requires "[t]he mature judgment of a particular, responsible Department of Justice official," just as the Congress has required that the judgment of such an official is "a critical precondition to any judicial order" to intercept wire communications. Id. at 515-16. There is a vast difference, however, between the specific demonstration of high-level judgment that the Congress has required before the Department may apply to the judicial branch for a wire intercept order, and how the Department may communicate to a committee of the Congress that, because the Department has no interest in prosecuting an individual (whom it has already prosecuted), the committee need not delay its application to the court for an immunity order.[14]

In the absence of any restriction imposed by statute, the Department should be able to communicate through its normal liaison channels to the Congress. The district court thought that it would be desirable to ascertain definitively that the presidential appointee in charge of congressional liaison had, in fact, authorized the communication of the Department's waiver. When that fact was established by Assistant Attorney General Crawford's letter of June 26, 1989, the district court properly concluded that the Committee's "request complies with the jurisdictional and procedural requirements of the law." In re Sealed Case, 791 F.2d 179, 181 (D.C. Cir.), cert. denied, 479 U.S. 924 (1986).

---

[14] Congress has always been particularly restrictive in authorizing applications for wiretaps. See, e.g., 28 U.S.C. § 594(a)(Supp. V 1987)(independent counsel has all authority of Department of Justice and Attorney General within his jurisdiction, including immunity application authority, except Attorney General retains all control over wiretap decisions requiring his "personal action" under 18 U.S.C. § 2516).

Finally, "even if a departure from the terms of the applicable regulations could be shown, [Mr. Borders] has demonstrated no prejudice arising from it." In re Application of the President's Commission on Organized Crime (Subpoena of Lorenzo Scaduto), 763 F.2d 1191, 1200 (11th Cir. 1985) (rejecting challenge to approval of immunity order by an Acting Assistant Attorney General). This is particularly so in light of the fact that the passage of time has robbed Mr. Borders' objection of any legal significance. The Committee notified the Attorney General on June 8, 1989 of its intent to apply for an immunity order. Without any waiver or other response from the Department of Justice, the Committee could have applied for an immunity order as early as June 18, 1989. Hence, by the time that the district court heard the matter on June 26, 1989, the question of waiver was entirely academic, as more than ten days had passed since the Committee's notification to the Attorney General on June 8, 1989. Between June 8, 1989 and

July 24, 1989, the return date on the subpoena to Mr. Borders, forty-six days has elapsed, or more than the total of thirty days that the Department could have delayed the Committee's application for an immunity order if it had exercised all authority that it possesses under the immunity statute to protect its prosecutorial interests. Accordingly, any question relating to the Department's response to the Committee's application to immunize Mr. Borders is moot and cannot serve as a basis to attack the district court's immunity order.

CONCLUSION

For these reasons, the appeal should be dismissed or, in the alternative, the order of the district court should be summarily affirmed.

Respectfully submitted,

Michael Davidson
Senate Legal Counsel

Ken U. Benjamin, Jr.
Deputy Senate Legal Counsel

Morgan J. Frankel
Assistant Senate Legal Counsel

642 Hart Senate Office Building
Washington, D.C. 20510
(202) 224-4435

Counsel for Appellee

Dated: July 24, 1989

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5189

IN THE MATTER OF THE APPLICATION OF
THE IMPEACHMENT TRIAL COMMITTEE ON THE
ARTICLES AGAINST JUDGE ALCEE L. HASTINGS

APPEAL OF WILLIAM A. BORDERS, JR.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMERGENCY MOTION OF APPELLEE IMPEACHMENT TRIAL COMMITTEE TO EXPEDITE CONSIDERATION OF COMMITTEE'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO SUMMARILY AFFIRM

The Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings ("Impeachment Trial Committee" or "Committee"), the appellee in this proceeding, moves for emergency consideration of its motion to expedite this Court's consideration of the Committee's motion to dismiss the appeal of William A. Borders, Jr., or, in the alternative, to summarily affirm the immunity order issued by the district court on June 27, 1989.

As described in the motion to dismiss or to affirm, the Committee is in the process of receiving evidence on the articles of impeachment against Judge Alcee L. Hastings. The central allegation against Judge Hastings is that he conspired with Mr. Borders to solicit a bribe to reduce the sentences of defendants in a case before Judge Hastings. Anticipating that Mr. Borders might assert his fifth amendment privilege against self-incrimination, the Committee applied for, and obtained on June 27, 1989, an immunity order under 18 U.S.C. §§ 6002 and 6005. The order provides that Mr. Borders "may not refuse to testify, and provide other information, at proceedings of [the Committee], on the basis of his privilege against self-incrimination." Mr. Borders filed a notice of appeal from the immunity order on July 6, 1989.

Pursuant to a Committee subpoena, Mr. Borders appeared with counsel before the Committee this morning, July 24, 1989. At no time prior to his appearance had he sought a stay of the immunity order from either the district court or this Court. After Mr. Borders refused to answer the questions posed by the Chairman, the Chairman communicated the immunity order to him pursuant to 18 U.S.C. § 6002. Notwithstanding the communication of the immunity order, Mr. Borders continued to refuse to answer the Committee's questions. His counsel stated that one basis for the refusal was that Mr. Borders' appeal was pending in this Court. Mr. Borders' counsel also stated that it was their intention to file a motion tomorrow, July 25, 1989, to stay the immunity order.[1]

As described in this Court's Handbook of Practice and Internal Procedures (August 1, 1987) at 38, "[f]iling a notice of appeal, or obtaining permission to appeal, does not automatically stay the operation of the judgment or order for which review is sought." The Committee overruled Mr. Borders' objections, including his objection to the unstayed immunity order. Although it could have proceeded immediately with consideration of contempt, the Committee determined that it should recall Mr. Borders on Thursday, July 27, 1989, at 4 p.m., in order to permit him a further opportunity to move for a stay and also to permit the Committee to move for dismissal of the appeal or for summary affirmance. The Committee is proceeding in this manner in the hope that expeditious action by this Court may persuade Mr. Borders, if he truly has any doubt, that he cannot rely on the pendency of his appeal as a basis for refusing to answer the Committee's questions.

The motion for emergency relief satisfies the requirements set forth in this Court's Handbook at 39. The accompanying motion to dismiss or, in the alternative, for summary affirmance demonstrates the high likelihood that the Committee will prevail in this appeal. The appeal should be dismissed because Mr. Borders, although he was heard in the district court, did not intervene and become a party. Also, an immunity order is interlocutory and nonappealable. In the alternative, the district court's immunity order should be summarily affirmed. The district court properly concluded that the procedural requirements of 18 U.S.C. § 6005 were satisfied. As required, the Committee authorized the immunity application by a two-thirds vote and notified the Attorney General of its intention to apply for an order. After the Department of Justice waived its right to receive ten-days notice of the Committee's intention to apply, the Committee filed its application before ten days had elapsed. See In re Application of United States Senate Permanent Subcommittee on Investigations (Cammisano), 655 F.2d 1232, 1236-38 (D.C. Cir.), cert. denied, 454 U.S. 1084 (1981). Mr. Borders' objection, which his counsel expressed to the Committee this morning, that the Attorney General should have personally signed the waiver (instead of the Assistant Attorney General for Legislative Affairs or her deputy) is meritless. In any event, Mr. Borders' objection to the form of the waiver is academic as forty-six days have passed since the Department was notified. The purpose of the ten-day notice provision is to enable the Department of Justice to lobby the Congress not to seek immunity, and also to enable the Department to seal its investigatory files so that it can demonstrate its possession of untainted evidence. However, the Department completed its prosecutorial interest in Mr. Borders in 1982 and, as the record below indicates, the Department has sought no delay in immunity for him.

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[1] This Court's Handbook specifically anticipates, at pages 39-40, that "[a] party filing or opposing a motion for stay or other emergency relief may, in addition or in the alternative, file a motion to dispose of the appeal or petition for review in its entirety."

There is no prospect of irreparable injury to Mr. Borders if this Court acts expeditiously on the motion to dismiss or affirm. Mr. Borders presents a narrow legal claim which does not require extensive briefing and argument. There is, however, substantial harm to others that is caused by Mr. Borders' invocation of his pending appeal as ground for refusing to testify. In a matter of such extraordinary importance as the impeachment trial of a United States judge, the testimony of the person who is alleged to have conspired with that judge would be of great importance. Thus, to help to avoid harm to the impeachment process and to serve the public interest in a full exposition of the facts, prompt consideration by this Court of the motion to dismiss or affirm is warranted.

CONCLUSION

The emergency motion to expedite the Court's consideration of the Committee's motion to dismiss or, in the alternative, for summary affirmance should be granted. The Committee requests that this be done on a schedule which would permit the Court to rule on the motion to dismiss or affirm, as well as on any motion by Mr. Borders for a stay, in advance of Mr. Borders' return to the Committee on Thursday, July 27, 1989, at 4 p.m.

Respectfully submitted,

Michael Davidson

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Dated: July 24, 1989

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST
JUDGE ALCEE L. HASTINGS

The United States Senate
Washington, D.C. 20510,

Applicant.

Misc. No. 89-129 (LFO)

MOTION TO INTERVENE

Now comes William A. Borders, Jr., by and through counsel, and moves the court for an order allowing him to intervene in the above captioned matter as an interested party. Without conceding the absolute necessity of filing this motion, the movant makes this motion pursuant to Rule 24 of the Federal Rules of Civil Procedure. The grounds for this motion are more particularly set forth below.

1. On June 29, 1989, District Court Judge Louis J. Oberdorfer entered an order granting use immunity to Mr. Borders so that he might testify at the proceedings of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings.
2. On July 6, 1989, Mr. Borders filed a notice of appeal. This appeal was filed based upon the reasonable conclusion that Mr. Borders, the subject of the District Court proceeding, was a party thereto.
3. Subsequently, Mr. Borders was subpoenaed by the Trial Committee and appeared on July 24, 1989.
4. Mr. Borders' appeal asserts that the procedural requirements of 18 U.S.C. § 6005 have not been met because the Attorney General did

not personally waive the 10-day and 20-day notice provision articulated in § 6005(b)(3) and (c). We therefore argue that Mr. Borders is not legally before the Impeachment Trail Committee, since the Trial Committee and the Department of Justice have failed to comport with the requirements of the statute. A more complete expatiation on the substantive issue is found in the attached Motion to Stay.

5. Rule 24 of the Federal Rules of Civil Procedure provides _inter alia_:

> Rule 24. Intervention
>
> (a) Intervention of Right
>
> ... (2) when the applicant claims an interest relating to the ... transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

See also Securities and Exchange Commission v. United States Realty and Improvement Co., 310 U.S. 434 (1940); _see also Neusse v. Corp._, 385 F.2d 694 (D.C. Cir. 1967); _Delaware Valley Citizen's Council v. Commonwealth of Pennsylvania_, 674 F.2d 970 (3rd Cir. 1982). Indubitably, Mr. Borders has an interest in this matter since he is the very subject of the Application for Immunity. The only way he will be able to protect his interest and force the Trial Committee and the Justice Department to comply with the procedural mandates of the statute is that he be allowed to intervene. Mr. Borders should not be forced to give potentially self-incriminating testimony before the Trial Committee which has not proceeded as is legally required by § 6005(b)(3) and (c).

Thus, Mr. Borders will suffer irreparable harm if he is not allowed to intervene. Nor will the allowance of the motion create prejudice or delay to the Trial Committee. There are other witnesses who may be heard by the Trial Committee.

6. Even if the Court decides that Mr. Borders may not intervene as a matter of right (Rule (24(a)1)), the Court may exercise its broad discretion under Rule 24(b) to allow Mr. Borders the right of intervention. See generally Moores, Federal Practice, vol. 3, § 24 (1987).

7. Accordingly, William A. Borders, Jr., respectfully requests that his Motion for Intervention be granted.

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE)
ON THE ARTICLES AGAINST)
JUDGE ALCEE L. HASTINGS)
) Misc. No. 89-129 (LFO)
The United States Senate)
Washington, D.C. 20510,)
)
Applicant.)

MOTION FOR STAY PENDING APPEAL

Comes now, William A. Borders, Jr., by and through counsel, and moves this Honorable Court, pursuant to Rule 62 of the Federal Rules of Civil Procedure, to stay its order of June 27, 1989, requiring him to testify and provide information to the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings. The grounds in support of this motion are set forth more particularly in the accompanying Memorandum of Points and Authorities.

Respectfully,

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Dated: July 25, 1989

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE)
ON THE ARTICLES AGAINST)
JUDGE ALCEE L. HASTINGS)
) Misc. No. 89-129 (LFO)
The United States Senate)
Washington, D.C. 20510,)
)
Applicant.)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF WILLIAM A. BORDERS' MOTION TO STAY ORDER OF JUNE 27, 1989 PENDING APPEAL

I. INTRODUCTION.

On June 7, 1989, the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings (hereinafter "the Trial Committee") adopted a resolution instructing the Senate Legal Counsel to apply for an order, pursuant to 18 U.S.C. § 6002 and § 6005, granting use immunity to William A. Borders, Jr., a potential witness at the Hastings impeachment trial. See Exh. A.

In accordance with 18 U.S.C. § 6005, the Trial Committee notified the Attorney General of its intention to request a use immunity order from the Federal District Court for the District of Columbia. This written notification to the Department of Justice is dated June 8, 1989. See Exh. B.

On June 9, 1989, the Senate Legal Counsel received a letter from the Department of Justice which purported to waive the provisions of 18 U.S.C. § 6005(b)(3) and (c). In the signature position was the name "Carol T. Crawford, Assistant Attorney General." The name was in typeface. The letter was signed by "John Mackey." See Exh. C.

On June 14, 1989, the Trial Committee filed an application for an order granting use immunity to Mr. Borders if he were called as a witness in the Hastings impeachment trial. On June 20, 1989, this Court issued an order requiring the parties to appear at a hearing on the matter.

The parties appeared before the Honorable Louis F. Oberdorfer, United States District Court Judge, on June 26, 1989, for a hearing. At the hearing, both the Appellant and the Appellee were present and represented by counsel. No representative of the Justice Department appeared. The Appellant objected to the Trial Committee's request for a grant of use immunity on the procedural grounds that the application failed to comport with the requirements set forth in 18 U.S.C. § 6005. Appellant argued that 18 U.S.C. § 6005(b)(3) and (c) had not been properly waived since waiver had not been effectuated by the Attorney General. The Court agreed with the Appellant's argument and the Appellee was offered an opportunity to rectify the procedural defect by having a presidential appointee in the Justice Department waive the requirements of 18 U.S.C. § 6005(b) (3) and (c).

The hearing was adjourned. On June 27, 1989, the Appellee filed documents with the District Court containing a second letter from the Justice Department signed by Carol T. Crawford, Assistant Attorney General. Again, this letter purports to exercise the Attorney General's sole prerogative of waiving 18 U.S.C. § 6005(b)(3) and (c). See Exh. D. By order of June 27, 1989, Judge Louis F. Oberdorfer granted the Trial Committee's request giving use immunity to William A. Borders, a potential witness in the Hastings trial. The order specifically states that the procedural requirements set forth in 18 U.S.C. § 6005 have been satisfied. See Exh. E. On July 6, 1989, William A. Borders, Jr. timely filed a Notice of Appeal in the United States Court of Appeals for the District of Columbia.

II. ARGUMENT.

Rule 62 of the Federal Rules of Civil Procedure vests in the district court the power to stay an order pending appeal. The factors governing a stay pending appeal are as follows: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent the stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) whether the public interest is served by a grant of the stay. Hilton v. Braunskill, 481 U.S. 770, 773; see, e.g., Washington Metropolitan Area Comm'n v. Holiday Tours Inc., 559 F.2d 841, 842-844 (1977); Virginia Petroleum Jobbers Assn. v. FPC, 259 F.2d 921, 928 (1958); Sylvester v. Sylvester,865 F.2d 1164, 1163 (10th Cir. 1989) ("A district court or court of appeals may order a stay of the execution of a judgment pending appeal for any reason the court considers proper."); Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986); Accident Fund v. Baerwaldt, 579 F. Supp. 724, 725 (WD Mich 1984); see also Beverly v. United States, 468 F.2d 732, 741 (5th Cir. 1972); J.L. v. Parham, 412 F. Supp. 141, 142 (MD Ga. 1976); see generally 11 C. Wright and A. Miller, Federal Practice and Procedure § 2904 (1985).

We submit that all of the elements set forth above are soundly met by the applicant in this case.

A. THE APPLICANT FOR STAY PENDING APPEAL IS LIKELY TO SUCCEED ON THE MERITS IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

(1) THE DISTRICT COURT'S GRANT OF USE IMMUNITY PURSUANT TO TITLE 18 U.S.C. § 6005 WAS WHOLLY ERRONEOUS AND CONSTITUTES REVERSIBLE PROCEDURAL ERROR.

(a) The Trial Committee's Request for Use Immunity Fails to Comply With the Procedural Requirements of 18 U.S.C. § 6005.

Title 18 of the United States code, § 6005 provides, inter alia:

> § 6005. Congressional proceedings
>
> (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or to provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.
>
> (b) Before issuing an order under subsection (a) of this section, a United States district court shall find that -
>
>> (2) in the case of a proceeding before a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee, and
>>
>> (3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order[.]
>
> (c) Upon application to the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

The preceding statutory provisions govern grants of use immunity in cases where an individual may be called as a witness before a committee or subcommittee of the House or Senate or a joint committee of both Houses of Congress. The Trial Committee is a committee of the Senate and therefore comes within the purview of § 6005. It is settled law that a request for use immunity (18 U.S.C. § 6002 - § 6005) by a committee of a House of Congress is a constitutionally valid exercise of a statutory right. See In re Sealed Case, 791 F.2d 179; 180-181 (D.C. Cir. 1986); cert. denied, 479 U.S. 924 (1986); see also In re Sealed Case, 776 F.2d 335 (1985); see generally P.A. Robinson, Criminal Law Defenses, 205 (Vol. 2) at 482-488 (1984).

It is equally clear that a request for use immunity must strictly comply with the requirements of 18 U.S.C. § 6005. The District Court "is to be a checkpoint" for ensuring that the procedural requirements of the provision have been met prior to the issuance of an order granting use immunity. Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270, 1278 (1973). The Court must "scrutinize the record to make certain that the congressional request for an immunity order is jurisdictionally and procedurally well-founded, and that the Attorney General has been notified." Id.

There are two procedural requirements under § 6005(b) which are applicable to the case sub judice: (a) the request for immunity must be approved by two-thirds of the full Committee (§ 6005(b)(2)); and (b) at least ten days prior to filing of the immunity request, the Committee must provide the Attorney General with notice of its intention to seek immunity for the witness (§ 6005(b)(3)). We submit that the Committee failed to comply with the 10-day notice requirement set out in

§ 6005(b)(3). Thus, the application for the use immunity request is procedural defective and should have been denied by the District Court.

On June 8, 1989, the Trial Committee properly notified, Richard Thornburgh, the Attorney General of the United States, of its intention to request an immunity order. See Exh. B. On June 9, 1989, a letter purporting to waive 18 U.S.C. § 6005(b)(3) and (c) was sent to Michael Davidson, Senate Legal Counsel. This letter was not signed by the Attorney General personally. It was signed by John Mackey for Carol T. Crawford, Assistant Attorney General. After the hearing on June 26, 1989, the Appellee submitted to the Court yet another letter purporting to waive 18 U.S.C. § 6005(b)(3) and (c). The letter was signed by "Carol T. Crawford, Assistant Attorney General." This letter was not personally signed by the Attorney General. On its face, § 6005(b)(3) does not specifically provide for a waiver of the 10-day notice provision. However, the decisional law of this circuit has interpreted § 6005(b)(3) to be directory and not mandatory. The Attorney General, in his discretion, may waive the provision since the provision inures only to the benefit of the Department of Justice. In re Application of the United States Permanent Subcommittee on Investigations (Cammisano), 655 F.2d 1232, 1235-1236 (D.C. Cir. 1981), cert. denied, 454 U.S. 1084 (1981); See Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270 (D.D.C. 1973); see also Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1282 (D.D.C. 1973).

There is no discussion in the case law indicating the circumstances which would justify a designee of the Attorney General acting in his stead. In Application of the United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1282 (D.D.C. 1973), the Attorney General, represented by the Watergate Prosecutor, Archibald Cox, waived the 10-day notice requirement of § 6005(b)(3) and the 20-day deferred period (§ 6005(c)) without objection.

We contend that the statute does not allow a designee of the Attorney General to act in his stead. Our construction of 18 U.S.C. § 6005(b)(3) and (c) is elucidated and supported by reading 18 U.S.C. § 6005 in pari materia with a related statute, 18 U.S.C. § 6003 which provides in toto:

> § 6003. Court and grand jury proceedings
>
> (a) In the case of an individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceedings is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in § 6002 of this part.
>
> (b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) to this section when in his judgment -
>
> > (1) the testimony or other information from such individual may be necessary to the public interest; and
> >
> > (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

It must be noted that § 6003(b) specifically provides that the approval of a request for an immunity order from a court must first have the approval of "the Attorney General, the Deputy Attorney General or any designated Attorney General." The United States Attorney requesting the order must, as required by subsection (b), seek such approval prior to filing the application in court under subsection (a). Both § 6003 and § 6005 are related statutes which regulate the grant of use immunity before judicial or quasi-judicial bodies. In § 6003 it is clear that Congress did not intend the Attorney General himself to be the sole repository of power when it comes to approving or disapproving a United States attorney's initial request, prior to filing the request with a court, for a use immunity order under § 6003(a). The power can be exercised by a Deputy Attorney General or a designated Assistant Attorney General. A designee is therefore allowable and sanctioned by the statute. Though § 6003 and § 6005 concern different proceedings, the proper construction of § 6005 when read *in pari materia* with § 6003 must force the court to the ineluctable conclusion that Congress did not intend anyone except the Attorney General to exercise the authority set forth in § 6005.

Thus, the canon of statutory interpretation, *expressio unius est exclusio alterius* should be applied. It holds that the expression of the one thing means the exclusion of another thing. There is an inference that all omissions from a statute are understood as exclusions. *See Botony Worsted Mills v. United States*, 278 U.S. 282, 289 (1929); *Tennessee Valley Authority v. United States*, 437 U.S. 153, 187-88 (1978); Broom's Legal Maxims 453 (12th Ed. 1960); *see also* IA Sutherland, *Statutes and Statutory Construction*, 47.23 (4th ed. 1984); 73 Am. Jur. 2d Statutes 211 (1974). Congress did not indicate that anyone other than the Attorney General could exercise the authority in § 6005(b)(3) and (c). No reference to a designee of the Attorney

General is found in the statute. Its express omission is reflexive of congressional intent. There is nothing peculiarly legal about the application of the maximum expressio unius est exclusio alterius in the instant case. It is a product of "legal and common sense." Broom's, supra at 453. "It expresses the learning of common experience that generally when people say one thing, they do not mean something else." Sutherland, supra at 127. If Congress had intended a designee to exercise the power set forth in § 6005(b)(3) and (c), it would have specifically stated so on the face of the statute. It unquestionably set out who could exercise approval authority under § 6003(b). Consequently, the letter of June 26, 1989, fails to waive the procedural requirements articulated in § 6005(b)(3) and (c). Nothing in the legislative history of the act or the decisional law would dictate a different result.

(b) Even If a Designee Does Have the Authority to Waive 18 U.S.C. § 6005(b)(3) and (c), the Letter of June 26, 1989, From The Department of Justice is Inadequate.

It has been established, supra, that the Attorney General has the power to waive the 10-day notice provision of § 6005(b)(3) and the 20-day notice provision of § 6005(c). However, Appellant submits that the letter of Assistant Attorney General, Carol T. Crawford fails to effectively and legally serve as a waiver. (See Exh. E). The letter states:

June 26, 1989

Michael Davidson, Esquire
Senate Legal Counsel
Room 642
Senate Hart Office Building
Washington, D.C. 20510-7250

Dear Mr. Davidson:

This is in response to your notice dated June 8, 1989, to Attorney General Thornburgh of the intention of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings to apply for an immunity order for William A. Borders, Jr.

The Department of Justice has no objection to the proposed order to compel the testimony of William A. Borders, Jr. and hereby waives the provisions of 18 U.S.C. Section 6005(b)(3) and (c).

By letter of June 9, 1989, the Department of Justice previously responded to your inquiry under the signature of John P. Mackey, Deputy Assistant Attorney General in this office, who was authorized to sign in my absence.

However, to alleviate any concerns the court might have on the Department's views as expressed in the June 9th letter, I again state those views herein.

Sincerely,

Carol T. Crawford
Assistant Attorney General

There is nothing in the record or in the letter which indicates that Ms. Crawford has been duly authorized to act as the Attorney General's designee. There is no evidence that the Attorney General has seen the request or has discussed it with Ms. Crawford. There is no evidence that the Attorney General was unavailable to review the request. There is simply no way to determine if Ms. Crawford is a designee, nor does she assert that she is the designee in the letter. The fact that she is a presidential appointee is not dispositive of the problem. All U.S. Attorneys are presidential designees. A U.S. Attorney who works for the Department of Education is a presidential designee. This fact would not give him authority to waive the provision of § 6005(b)(3) and (c). The statute is silent as to whom a designee of the Attorney General must be or whether there may be a designee.

The wiretap case of United States v. Giordono, 416 U.S. 505 (1974), is similar to this case and is instructive. In Giordono, the

Supreme Court of the United States strictly construed 18 U.S.C. § 2516(1) (Title III of the Omnibus Crime Control and Safe Streets Act of 1986). § 2616 states, inter alia:

> the Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal Judge ... for ... an order authorizing or approving the interception of wire or oral communications.

The Defendant Giordono, a narcotics dealer, challenged evidence derived from a wiretap by the FBI on his telephone. During the suppression hearings, it developed that the initial wiretap had been authorized by the Attorney General's Executive Assistant, not the Attorney General or his special designated Assistant Attorney General. U.S. v. Giordono, 416 at 510. After a careful review of the statute's legislative history and a thorough analysis of § 2516(1), the Supreme Court held that Congress did not intend the power to authorize wiretap applications to be exercised by any individuals other than the Attorney General or an Assistant Attorney General specially designated by him. Id. at 512-523. Section 2516(1) was intended to limit the power to authorize wiretap applications to the Attorney General and to any Assistant Attorney General he might designate. Id. at 512-514. The purpose of restricting approval of wiretap applications to the Attorney General or his specially designated Assistant Attorney General was to make sure that this critical act of judgment, affecting individual civil rights, was the exercise or mature judgment by a responsible official in the Department of Justice. Id. at 516, 517-518. Accordingly, the authorization or approval of the wiretap application by the Attorney General's Executive Assistant contravened 18 U.S.C. § 2516(1). All evidence derived as a result of such approvals was suppressed.

By analogy, if a designee under § 6005(b)(3) waives the 10-day notice rule, the identity of the designee must be clear and ascertainable. There should be no question as to whether the official is the proper designee of the Attorney General. The rationale of Giordono is applicable here. The individual waiving the 10-day notice period should be a mature, responsible official capable of properly exercising critical judgment as to whether the provision should be waived. We cannot be certain that Carol T. Crawford is such an individual. The legislative purpose of § 6005(b)(3) indicates that this is an important provision. It provides the Department of Justice time to lobby for a change of minds on the part of the Congressional Committee, should the Attorney General object to the grant of immunity. It also gives the Attorney General an opportunity to insulate from a grant of immunity any incriminating data already in his files prior to the witness' testimony. Cammisano, 665 F.2d at 1236.

We submit that the letter of June 26, 1989, sorely fails to reveal whether Carol T. Crawford is authorized to waiver the 10-day notice provision. Consequently, the 10-day notice procedural requirement of § 6005(b)(3) has not been met. The application for an order granting use immunity to Mr. Borders was filed on June 14, 1989. Notice of intent to request the order was given to the Attorney General on June 8, 1989. The application should not have been filed with the Court prior to June 8, 1989, 10-days after notice was given to the Attorney General. Furthermore, a fortiori, the letter did not effectively waive § 6005(c) which allows the Attorney General to request that the district court defer subsection (a) for a period, not longer than 20-days from the date of the request for such order. However, § 6005(c) unlike § 6005(b)(3) is not a condition precedent for filing the request for use immunity order with the District Court. Nevertheless, it was not effectively waived. Thus, the applicant has made a strong showing that his appeal is likely to succeed on its merit.

B. THE APPLICANT WILL BE IRREPARABLY INJURED ABSENT A STAY PENDING APPEAL.

Contrary to the District Court judge's Order of June 27, 1989, the applicant for stay asserts that the procedural requirements of 18 U.S.C. § 6005(b)(3) and (c) have not been met and therefore the application for use immunity, approved by Judge Oberdorfer, should have been denied, as was done in the first instance at the Hearing on the Trial Committee's first application held June 26, 1989. Though the applicant has appealed the District Court's order, Mr. Borders has been subpoenaed to testify before the Trial Committee. Thus, a stay pending appeal is necessary in order to maintain the status quo and to prevent the issue raised on appeal from becoming moot during the appeal process. Therefore, Mr. Borders would be irreparably harmed if he is required to give testimony before the Trial Committee, since it would have the effect of negating his appeal. If Mr. Borders is forced to testify before the Trial Committee, such potential self-incriminating testimony could never be erased. A subsequent successful decision on appeal would be a hollow and pyrrhic victory.

C. A STAY PENDING APPEAL WILL NOT INJURE THE IMPEACHMENT TRIAL COMMITTEE.

The Trial Committee is ably represented by legal counsel and should not have had problems meeting the procedural requirements of 18 U.S.C. § 6005(b)(3) and (c). The Trial Committee's legal counsel is certainly charged with actual or constructive knowledge of the proper procedure used to waive the requirements of the statute. Yet, counsel for the Trial Committee and the Department of Justice have failed to properly and legally execute a waiver of § 6005(b)(3) and (c). The Justice Department has had two opportunities to effect a legally cognizable or valid waiver and both attempts have fallen short of the legal mark. It is not the fault of the applicant that the other parties to this proceeding have not moved competently to waive the requirements of the statute. The present litigation in this Court and the Court of Appeals has been precipitated by the procedural ineptitude of the Trial Committee and the Justice Department. The applicant for stay is blameless. Consequently, any burden to be borne must be placed squarely on the shoulders of the Trial Committee or the Department of Justice if the equities are to be properly and fairly balanced.

No irreparable harm could possibly come to the Trial Committee. The Trial Committee may ultimately have another opportunity to correct the procedural mishap it created. The Congress, after careful study, enacted § 18 U.S.C. §§ 6002 - 6005. See Measures Relating to Organized Crime, Hearing on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122 and S. 2292 Before the Subcommittee on Criminal Law and Proceeding of the Senate Committee on the Judiciary, 91st Cong. 1st Sess. 292 (1969) (draft provision §4). See also S Rep.

No. 617, 91st Cong., 1st Sess. 55 (1969); see generally II Working Papers, National Commission on Reform of Federal Criminal Law 1406 (1970). Accordingly, the Trial Committee and the Justice Department must be required to rigidly adhere to the procedure set forth in the statute, lest the importance of 18 U.S.C. § 6005 be denigrated and the intention of its framers disrespected and belittled.

D. THE PUBLIC INTEREST WILL BE SERVED BY THE STAY PENDING APPEAL.

Finally, the public interest will be served by the Courts grant of a stay. The people have vested in Congress, through the constitution, the power and legislative authority to promulgate law. Congress has done so in the instant case. It has promulgated 18 U.S.C. § 6005 which enumerates specific procedural safeguards. These safeguards must be complied with before an application for use immunity may be filed and approved. The Trial Committee and Justice Department have not complied with the requirements of the law. By granting the applicants stay pending appeal, the Court speaks for the people. It orders the government to act in accordance with those laws which have been passed for the protection of the citizenry. The Court acts as a public watchdog and the public interest is vindicated; justice prevails. The people are therefore assured that it may rely on the Courts to require the government to respect and comply with the rule of law.

III. CONCLUSION.

Accordingly, predicated upon the aforegoing analysis, the applicant for stay pending appeal respectively request that its motion for stay be allowed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5189

IN THE MATTER OF THE APPLICATION OF
THE IMPEACHMENT TRIAL COMMITTEE ON THE
ARTICLES AGAINST JUDGE ALCEE L. HASTINGS

APPEAL OF WILLIAM A. BORDERS, JR.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION TO EXTEND TIME AND OPPOSITION OF WILLIAM A. BORDERS, JR. TO EMERGENCY MOTION OF APPELLEE TO EXPEDITE CONSIDERATION OF ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO SUMMARILY AFFIRM

Now comes William A. Borders, Jr., by and through counsel, opposing the Emergency Motion of the Appellee to Expedite Consideration of Its Motion to Dismiss or, in the Alternative, to Summarily Affirm and requesting an extension of time to respond to the Motion to Dismiss or Summarily Affirm filed by the Appellee on June 24, 1989. Counsel makes the Motion to Extend time pursuant to Rule 26 of the Federal Rules of Appellate Procedure. Counsel files this Opposition pursuant to Rule 27 of the Federal Rules of Appellate Procedure. The reasons for this Motion are more particularly set forth below:

1. On June 24, 1989, Mr. William A. Borders was served with an Emergency Motion of Appellee to Expedite Consideration of its Motion to Dismiss or Summarily Affirm the appeal filed by Mr.

Borders on July 6, 1989. A separate Motion to Dismiss or Summarily Affirm was also served on Mr. Borders. On appeal, Mr. Borders challenges as wholly erroneous the decision of Judge Louis Oberdorfer dated June 27, 1989. See Exh. A.

2. Mr. Borders appeared before the Impeachment Trial Committee on July 24, 1989. Mr. Borders has been required to reappear before the Impeachment Trial Committee on July 27, 1989.

3. In its Emergency Motion to Expedite Consideration, the Trial Committee requested that the Court dispose of their Motion to Dismiss or Summarily Affirm Mr. Borders' appeal within a period of two days without proper and fair response by Mr. Borders, the Appellant.

4. Since Mr. Borders was served with the Motion to Expedite Consideration of its Motion to Dismiss or Summarily Affirm along with the Motion to Dismiss or Summarily Affirm on June 24, 1989, it would be a travesty of justice to force Mr. Borders to respond to these important motions within two days. Such a course of action would deprive Mr. Borders of his right to be heard or his day in court.

5. Though the Trial Committee in its motion claims harm to the important impeachment process as a reason for expediting the consideration of its Motion to Dismiss or Summarily Affirm, this argument is woven out of whole cloth. No impairment to the process could occur since the Trial Committee may call other witnesses.

6. If the Motion to Expedite Consideration is allowed only Mr. Borders

will be harmed since two days is not enough time to respond to the Appellee's Motion.

7. Mr. Borders would further request an extension of time to August 4, 1989, to respond to the Trial Committee's Motion to Dismiss or Summarily Affirm. Rule 26(b) of the Federal Rules of Appellate Procedural authorizes this court to enlarge time for good cause shown. The seriousness of the Motion to Dismiss or Summarily Affirm which has been filed in the instant case is good cause to allow Mr. Borders adequate time to properly brief the issues raised in the motion.

8. We therefore respectfully request that the Court deny the Appellee's Motion to Expedite Consideration of its Motion to Dismiss or Summarily Affirm and to grant Mr. Borders' Motion for an Extension of Time. Mr. Borders would then have a fair opportunity to properly respond to Appellee's Motion to Dismiss or Summarily Affirm.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS

The United States Senate
Washington, D.C. 20510,

Applicant.

Misc. No. 89-129 (LFO)

OPPOSITION OF THE IMPEACHMENT TRIAL COMMITTEE TO WILLIAM A. BORDERS' MOTIONS FOR A STAY PENDING APPEAL AND TO INTERVENE

The Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings ("Impeachment Trial Committee" or "Committee") files this memorandum in opposition to the motions of William A. Borders, Jr., for a stay pending appeal and to intervene. The order which Mr. Borders seeks to have stayed provides, after "determining that the procedural requirements set forth in 18 U.S.C. § 6005 have been satisfied," that "William A. Borders, Jr., may not refuse to testify, and provide other information, at proceedings of the [Committee], on the basis of his privilege against self-incrimination."

STATEMENT

The Impeachment Trial Committee was appointed, pursuant to Senate Resolution 38 of the 101st Congress and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, to receive and report to the Senate evidence on the articles of impeachment against Judge Hastings. Article I alleges that "[f]rom some time in the first half of 1981 and continuing through October 9, 1981, Judge Hastings and William Borders, then a Washington, D.C. attorney, engaged in a corrupt conspiracy to obtain $150,000 from defendants in United States v. Romano, a case tried before Judge Hastings, in return for the imposition of sentences which would not require incarceration of the defendants."[1] Articles II-VI and VIII-IX also specifically refer to Mr. Borders.

The Committee voted on June 7, 1989, pursuant to 2 U.S.C. §§ 288b(d) and 288f, to direct the Senate Legal Counsel "to apply for a court order immunizing from use in prosecutions the testimony of, and other information provided by, William A. Borders, Jr., at proceedings of the Committee."[2] The June 7, 1989 resolution was approved by nine of the twelve members of the Committee, and satisfies the requirement in 18 U.S.C. § 6005(b)(2) that "in the case of a proceeding before a committee ... of either House of Congress ... the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee." 18 U.S.C. § 6005(b)(2).

1/ Mr. Borders was convicted in 1982 of conspiring with Judge Hastings to solicit a bribe. United States v. Borders, 693 F.2d 1318 (11th Cir. 1982), cert. denied, 461 U.S. 905 (1983). Judge Hastings was acquitted in a separate trial in 1983.

2/ During the House impeachment proceedings Mr. Borders asserted his fifth amendment privilege, but no immunity was sought. H.R. Rep. No. 810, 100th Cong., 2d Sess. 11 (1988).

On June 8, 1989, "the Attorney General was served with notice of an intention to request the order." 18 U.S.C. § 6005(b)(3). On June 9, 1989, a letter signed by John Mackey for Carol Crawford, the Assistant Attorney General for Legislative Affairs, notified the Committee as follows:

> This is in response to your notice dated June 8, 1989, to Attorney General Thornburgh of the intention of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings to apply for an immunity order for William A. Borders, Jr.
>
> The Department of Justice has no objection to the proposed order to compel the testimony of William A. Borders, Jr. and hereby waives the provisions of 18 U.S.C. Section 6005(b)(3) and (c).

Section 6005(b)(3) provides that a congressional committee's notice of intention to apply for an immunity order should be served "ten days or more prior to the day on which the request for such an order [is] made." 18 U.S.C. § 6005(b)(3). The Department's waiver of that requirement allowed the Committee to apply for the immunity order without waiting for the full ten-day period to lapse. As will be described below, the Department of Justice's authority to "waive the 10-day notice requirement" has been upheld by this Court as "consonant with congressional intent and common sense."[3]

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[3] In re Application of United States Senate Permanent Subcommittee on Investigations (Cammisano), 655 F.2d 1232, 1236-38 (D.C. Cir.), cert. denied, 454 U.S. 1084 (1981). The Department's letter also waived the authority of the Attorney General to obtain a twenty-day deferral of the issuance of an immunity order. 18 U.S.C. § 6005(c). The Department was able (footnote continued)

On June 14, 1989, the Committee filed in this Court its ex parte application, Ryan v. Commissioner of Internal Revenue, 568 F.2d 531, 539-40 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978), for an immunity order.[4] By an order dated June 19, 1989, this Court set the application down for hearing on June 26, 1989. The Department of Justice, counsel for the parties to the impeachment (the House and Judge Hastings), and counsel for Mr. Borders were notified; we provided each with copies of our application.

The Department of Justice, the House, and Judge Hastings did not appear at the June 26, 1989 hearing. Mr. Borders did appear and, through counsel, opposed the Committee's application. Arguing, inter alia, that the Department's June 9, 1989 letter did not identify the position of John Mackey, who had signed the letter for Assistant Attorney General Carol Crawford, Mr. Borders contended that the letter was insufficient to waive the 10-day notice provision in 18 U.S.C. § 6005(b)(3).

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to respond quickly to the Committee's formal notification to the Attorney General of the Committee's intention to apply for an immunity order for Mr. Borders because Committee counsel had provided advance notification of the Committee's possible interest in immunizing Mr. Borders to the Witness Immunity Unit in the Criminal Division by a letter dated May 22, 1989.

[4] We utilized the Department's waiver to accelerate the filing of the immunity application in order to be prepared in the event that the Committee, at the request of the parties or on its own initiative, summoned Mr. Borders to a pretrial examination in June. However, Mr. Borders was not summoned for a pretrial examination. The Committee's evidentiary hearings began on July 10, 1989.

In response, we argued that the question of the Department's waiver of the ten-day provision was academic because the passage of eighteen days between the June 8, 1989 notification to the Attorney General, and June 26, 1989, when the district court heard the application, meant that no waiver was necessary. The Court responded with the following guidance:

> I understand all of the arguments on the merits why this is possibly an unnecessary precaution, but I would feel more comfortable if you would obtain from the United States a waiver signed, if not by the Attorney General personally, at least by a presidential appointee or at least someone who can be identified.

Transcript at 10-11. The Court stated "there must be somebody there who is a presidential appointee who can sign a letter in a matter of this significance." Id. at 12.

In accord with the Court's suggestion that we file a letter signed by a presidential appointee, on June 27, 1989 we filed a June 26, 1989 letter signed by Carol Crawford, the Assistant Attorney General for Legislative Affairs. Ms. Crawford's letter reiterated the first two paragraphs of the letter that John Mackey had signed on June 9, 1989, and added:

> By letter of June 9, 1989, the Department of Justice previously responded to your inquiry under the signature of John P. Mackey, Deputy Assistant Attorney General in this office, who was authorized to sign in my absence.

> However, to alleviate any concerns the court might have on the Department's views as expressed in the June 9th letter, I again state those views herein.

This Court, then "determining that the procedural requirements set forth in 18 U.S.C. § 6005 have been satisfied," issued the immunity order.

Mr. Borders filed a notice of appeal on July 6, 1989. On July 24, 1989, Mr. Borders appeared before the Committee pursuant to its subpoena.[5] He refused to answer all questions. Although the immunity order was communicated to him, Mr. Borders, through counsel, declined to answer the Committee's questions because of his pending appeal.[6] Mr. Borders continued to refuse to answer the Committee's questions after the Committee overruled his objections and directed him to answer. Mr. Borders has been directed to appear again before the Committee on July 27, 1989, at 4 p.m.

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[5] The Committee subpoenaed Mr. Borders on its own initiative after it became clear that neither the House nor Judge Hastings would call him as a witness, in spite of his central role in this matter. Although the Senate is not bound by the Federal Rules of Evidence, the Committee has utilized the rules for guidance. Rule 614 provides that "[t]he court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called." This rule draws in large part on Justice Frankfurter's observation that "[a] trial is not a game of blind man's buff; and the trial judge -- particularly in a case where he himself is the trier of the facts upon which he is to pronounce the law -- need not blindfold himself by failing to call an available vital witness simply because the parties, for reasons of trial tactics, choose to withhold his testimony." Johnson v. United States, 333 U.S. 46, 54 (1948)(dissenting in part).

[6] Mr. Borders' counsel also asserted other objections, such as double jeopardy and the prohibition against cruel and unusual punishment, as grounds not to testify. Those objections are not part of the pending appeal.

ARGUMENT

I.

THE MOTION FOR A STAY SHOULD BE DENIED

The claim which Mr. Borders is asserting, that the Department of Justice did not use a proper official in waiving the period for its advance notice of the filing of an immunity application, involves a provision that was never intended to benefit a potential witness. Rather, as this Court has held, the ten-day notice provision "was plainly intended to benefit *solely* the Department of Justice." *Cammisano*, 655 F.2d at 1236 (emphasis in opinion). The purpose of the notification provision is to "provide[] the Department of Justice with '"time" to "lobby" for a change of mind' on the part of the congressional committee should the Attorney General object to the grant of immunity." *Id.* (citation omitted).[7] Mr. Borders' stay motion should be denied because he is "raising matters in which [he] has no legitimate interest." *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S.Ct. 2268, 2271 (1988).

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[7] A second purpose of the 10-day notice requirement, and the purpose of the 20-day deferral power, is to "give[] the Attorney General 'an opportunity to insulate from the immunity grant any incriminating data already in his files prior to the witness' testimony.'" *Id.* (citation omitted).

Because the notification provision of the immunity statute is for the sole benefit of the Department of Justice, it is important to note that the Department of Justice's interest in prosecuting Mr. Borders in connection with the alleged conspiracy to bribe Judge Hastings was satisfied by Mr. Borders' conviction in 1982. Following his conviction, the Department itself obtained a use immunity order for Mr. Borders' testimony before a grand jury that was investigating another bribery matter concerning Judge Hastings. In Re: Grand Jury Proceedings, Grand Jury 81-1 (Mia.) (William A. Borders, Jr.), Order of July 26, 1982 (S.D. Fla.).[8] The Department was given advance notification that the Committee was considering an application for an immunity order in this matter, and it was prepared to act quickly when formal notification was given to the Attorney General on June 8, 1989.

The Department has formal designations of authority of those Assistant Attorney Generals who are authorized to apply to the district courts for deferrals of up to twenty days of the issuance of immunity orders for congressional testimony. 28 C.F.R. § 0.176 (1988). When the Department decides not to seek any of the limited delay that the immunity statute authorizes, the Congress may be notified of that determination by the Assistant Attorney General for Legislative Affairs, who has responsibility for "[m]aintaining liaison between the Department and Congress." Id., § 0.27. Assistant Attorney General Carol Crawford's letter of June 26, 1989, ratifying her deputy's letter of June 9, 1989, establishes beyond question that a responsible Department official communicated to the Congress that the Department had no interest in any further delay in the filing of the Committee's immunity application.

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[8] Mr. Borders refused to testify and was held in civil contempt and incarcerated for the duration of the inquiry, which we believe was for a period of between four and six weeks.

Mr. Borders argues that United States v. Giordano, 416 U.S. 505 (1974), establishes by analogy a requirement that waiver of the notification period under the immunity statute requires "[t]he mature judgment of a particular, responsible Department of Justice official," just as the Congress has required that the judgment of such an official is "a critical precondition to any judicial order" to intercept wire communications. Id. at 515-16. There is a vast difference, however, between the specific demonstration of high-level judgment that the Congress has required before the Department may apply to the judicial branch for a wire intercept order, and how the Department may communicate to a committee of the Congress that, because the Department has no interest in prosecuting an individual (whom it has already prosecuted), the committee need not delay its application to the court for an immunity order.[9]

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[9] Congress has always been particularly restrictive in (footnote continued)

In the absence of any restriction imposed by statute, the Department should be able to communicate through its normal liaison channels to the Congress. This Court exercised its discretion in determining that it would be desirable to ascertain definitively that a presidential appointee had, in fact, authorized the communication of the Department's waiver. When that fact was established by Assistant Attorney General Crawford's letter of June 26, 1989, this Court properly concluded that the Committee's "request complies with the jurisdictional and procedural requirements of the law." In re Sealed Case, 791 F.2d 179, 181 (D.C. Cir.), cert. denied, 479 U.S. 924 (1986).

Further, in response to Mr. Borders' argument that the Attorney General should personally sign a waiver of the notification period, it should be noted that the waiver that this Circuit approved in Cammisano was signed by an Assistant Attorney General. 655 F.2d at 1234.

"[E]ven if a departure from the terms of the applicable regulations could be shown, [Mr. Borders] has demonstrated no prejudice arising from it." In re Application of the President's Commission on Organized Crime (Subpoena of Lorenzo Scaduto), 763 F.2d 1191, 1200 (11th Cir. 1985) (rejecting chal-

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authorizing applications for wiretaps. See, e.g., 28 U.S.C. § 594(a)(Supp. V 1987)(independent counsel has all authority of Department of Justice and Attorney General within his jurisdiction, including immunity application authority, except Attorney General retains all control over wiretap decisions requiring his "personal action" under 18 U.S.C. § 2516).

lenge to approval of immunity order by an Acting Assistant Attorney General). This is particularly so in light of the fact that the passage of time has robbed Mr. Borders' objection of any legal significance. The Committee notified the Attorney General on June 8, 1989 of its intent to apply for an immunity order. Without any waiver or other response from the Department of Justice, the Committee could have applied for an immunity order as early as June 18, 1989. Hence, by the time that this Court heard the matter on June 26, 1989, more than ten days had passed since the Committee's notification to the Attorney General on June 8, 1989. Between June 8, 1989 and July 24, 1989, the return date on the subpoena to Mr. Borders, forty-six days had elapsed, or more than the total of thirty days that the Department could have delayed the Committee's application for an immunity order if it had exercised all authority that it possesses under the immunity statute to protect its prosecutorial interests. Accordingly, any question relating to the Department's response to the Committee's application to immunize Mr. Borders is moot and cannot serve as a basis to attack this Court's immunity order.

Finally, on the equities, there is no prospect of irreparable injury to Mr. Borders by the denial of the stay application. The Court's order gives him all that he is constitutionally entitled to, immunity from the use of his testimony against him. There would, however, be substantial harm to others if the stay is granted. In a matter of such extraordinary importance as the impeachment trial of a United States judge, the testimony of the person who is alleged to have conspired with that judge would be of great importance. Thus, to help to avoid harm to the impeachment process and to serve the public interest in a full exposition of the facts, denial of the stay is warranted.

II.

THE MOTION TO INTERVENE SHOULD BE DENIED

Mr. Borders' motion to intervene should be denied as his own appeal has divested this Court of jurisdiction to grant that motion.

CONCLUSION

For these reasons, the motions to stay and to intervene should be denied.

Respectfully submitted,

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Senate Legal Counsel

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Deputy Senate Legal Counsel

Morgan J. Frankel
Assistant Senate Legal Counsel

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(202) 224-4435

Counsel for Impeachment Trial Committee

Dated: July 26, 1989

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE IMPEACHMENT TRIAL COMMITTEE)
ON THE ARTICLES AGAINST JUDGE)
ALCEE L. HASTINGS)
) Misc. No. 89-129-LFO
The United States Senate)
Washington, D.C. 20510,)
Applicant.)
)
)
)

FILED

JUL 26 1989

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

For reasons stated in a memorandum to be filed, it is this 26th day of July, 1989, hereby

ORDERED: that the motion of William A. Borders, Jr., for leave to intervene is GRANTED nunc pro tunc to June 26, 1989, and it is further

ORDERED: that Mr. Borders' motion for a stay pending appeal is DENIED.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

July 26, 1989
4:30 P.M.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
JUL 26 1989
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

Impeachment Trial Committee
on The Articles Against
Judge Alcee L. Hastings,

v.

United States Senate,
Washington, D.C.

Misc. No. 89-129

MEMORANDUM

On June 14, 1989, the Impeachment Trial Committee of the United State Senate requested an order granting use immunity to William A. Borders, Jr. on account of any testimony he might give in respect to the impeachment of Judge Alcee L. Hastings. Mr. Borders along with counsel, as well as counsel for the Impeachment Trial Committee, appeared at a June 26 hearing on the request. A June 27, 1989 Order granted the request. On July 6, 1989, Mr. Borders filed a Notice of Appeal (No. 89-5189).

On July 25, 1989, Mr. Borders filed in this Court motions to intervene and for a stay pending appeal. The motion for a stay indicates that the appeal will challenge the June 27 Order on the ground that the movant failed to comply with the provision of 18 U.S.C. § 6005(b)(2) in that the Committee's request for the use immunity order was made less than 10 days after it was served on the Attorney General and that the Attorney General had not personally waived the 10-day requirement.

It is unlikely that Mr. Borders will prevail on the merits of his appeal for, among other reasons, 18 U.S.C. § 60005(b)(2) is designed to protect the Attorney General's interests -- not that of the prospective witness. Moreover, the Department of Justice has now had more than ten days in which to protect its interest so that any defect in the notice or the waiver is of no material consequence to Mr. Borders. Assuming that the motion for a stay pending appeal is cognizable at this level, it must be denied.

As to intervention, Mr. Borders appeared personally with counsel at the June 26 hearing and his counsel argued in opposition to the Committee's request for a use immunity order. There was no formal motion for leave to intervene. However, his participation was a _de facto_ intervention which is formally ratified by an order entered earlier today granting him leave to intervene _nunc pro tunc_ to June 26, 1989.

Date: June 26, 1989
5:10 P.M.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

United States District Court for the District of Columbia

FILED JUL 2 6 1989

JAMES F. DAVEY
CLERK

IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES OF IMPEACHMENT AGAINST JUDGE ALCEE L HASTINGS

Plaintiff.

vs.

Defendant.

MISC ~~Civil~~ No. 89-129(LFO)

RECEIVED
JUL 26 4 31 PM '89
JAMES F. DAVEY CLERK
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

NOTICE OF APPEAL

Notice is hereby given this 26TH day of JULY, 1989, that

WILLIAM A BORDEN

hereby appeals to the United States Court of Appeals for the District of Columbia from the ORDER ~~judgment~~ of this Court entered on the 26TH day of JULY, 1989 ~~in favor of~~ DENYING THE MOTION TO STAY PENDING ~~against said~~ APPEAL

Attorney for
MICHAEL S. RASIER
1420 K ST NW #711
WASH. D.C. 20005

CLERK: Please mail copies of the above Notice of Appeal to the following at the addresses indicated:

CC. MICHAEL DAVIDSON
642 HART SENATE BLD
WASH. DC. 20510

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5189 September Term, 19 88
Misc. No. 89-0129

Impeachment Trial Committee on The
Articles Against Judge Alcee L. Hastings

v.

United States Senate

William A. Borders, Jr.,

Appellant

United States Court of Appeals
For the District of Columbia Circuit

FILED JUL 26 1989

CONSTANCE L. DUPRÉ
CLERK

BEFORE: Buckley and Sentelle, Circuit Judges

O R D E R

Upon consideration of appellee's motion to expedite consideration of the motion to dismiss or, in the alternative, for summary affirmance, the opposition thereto, and appellant's motion to extend time for filing a response to the motion for summary affirmance, it is

ORDERED that the motion for expedited consideration be denied. Expedition is an extraordinary remedy and, in this case, appellee has failed to demonstrate that it will suffer irreparable injury absent expedition. See D.C. Circuit Handbook of Practice and Internal Procedures 40-41 (1987). We note that if appellant refuses to comply with district court's order filed June 27, 1989, appellee may seek enforcement through civil contempt proceedings. See United States Senate Permanent Subcommittee on Investigations, 655 F.2d 1232, 1238 (D.C. Cir. 1981). It is

FURTHER ORDERED that motion to extend the time for filing a response to the motion for summary affirmance be denied. Accordingly, appellant's response to the motion for summary affirmance is due July 31, 1989.

Per Curiam

RECEIVED
[illegible] 1989
CLERK OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

William A. Borders, Jr.,
Appellant,

v. No. 89-5189

Impeachment Trial Committee
on the Articles Against
Judge Alcee L. Hastings,
United States Senate
Appellee.

OPPOSITION OF WILLIAM A. BORDERS, JR. TO THE IMPEACHMENT TRIAL COMMITTEE'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO SUMMARILY AFFIRM

Comes [illegible] William A. Borders, Jr., by and through counsel, opposing the [illegible]chment Trial Committee's Motion to Dismiss the Appeal or for Summary Affirmance. The Appellant makes this motion pursuant to Rule 27(a) of the Federal Rules of Appellate Procedure and Rule 7(d) of the General Rules of the United States Court of Appeals for the District of Columbia. The grounds for this Opposition are set out more particularly below.

I. INTRODUCTION.

On June 7, 1989, the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings (hereinafter "the Trial Committee") adopted a resolution instructing the Senate Legal Counsel to apply for an order, pursuant to 18 U.S.C. § 6002 and § 6005, granting use immunity to William A. Borders, Jr., a potential witness at the Hastings impeachment trial. *See* Exh. A.

In accordance with 18 U.S.C. § 6005, the Trial Committee notified the Attorney General of its intention to request a use immunity order from the Federal District Court for the District of Columbia. This written notification to the Department of Justice is dated June 8, 1989. See Exh. B.

On June 9, 1989, the Senate Legal Counsel received a letter from the Department of Justice which purported to waive the provisions of 18 U.S.C. § 6005(b)(3) and (c). In the signature position was the name "Carol T. Crawford, Assistant Attorney General." The name was in typeface. The letter was signed by "John Mackey." See Exh. C.

On June 14, 1989, the Trial Committee filed an application for an order granting use immunity to Mr. Borders if he were called as a witness in the Hastings impeachment trial. On June 19, 1989, this Court issued an order requiring the parties to appear at a hearing on the matter.

The parties appeared before the Honorable Louis F. Oberdorfer, United States District Court Judge, on June 26, 1989, for a hearing. At the hearing, both the Appellant and the Appellee were present and represented by counsel. No representative of the Justice Department appeared. The Appellant objected to the Trial Committee's request for a grant of use immunity on the procedural grounds that the application failed to comport with the requirements set forth in 18 U.S.C. § 6005. Appellant argued that 18 U.S.C. § 6005(b)(3) and (c) had not been properly waived since waiver had not been effectuated by the Attorney General. The Court agreed with the Appellant's argument and the Appellee was offered an opportunity to rectify the procedural defect by having a presidential appointee in the Justice

Department waive the requirements of 18 U.S.C. § 6005(b)(3) and (c).

The hearing was adjourned. On June 27, 1989, the Appellee filed documents with the District Court containing a second letter from the Justice Department signed by Carol T. Crawford, Assistant Attorney General. Again, this letter purports to exercise the Attorney General's sole prerogative of waiving 18 U.S.C. § 6005(b)(3) and (c). See Exh. D. By order of June 27, 1989, Judge Louis F. Oberdorfer granted the Trial Committee's request giving use immunity to William A. Borders, Jr., a potential witness in the Hastings trial. The order specifically states that the procedural requirements set forth in 18 U.S.C. § 6005 have been satisfied. See Exh. E. On July 6, 1989, William A. Borders, Jr. timely filed a Notice of Appeal in the United States Court of Appeals for the District of Columbia.

On July 24, 1989, Mr. Borders appeared before the Trial Committee pursuant to its subpoena of July 19, 1989. Mr. Borders, because of his pending appeal, double jeopardy and cruel and unusual punishment refused to testify before the Trial Committee. On July 24, 1989, the Trial Committee filed in this Court a Motion to Dismiss the Appeal or to Summarily Affirm the trial courts order of June 27, 1989. The Trial Committee also filed a Motion to Expedite Consideration of its Motion to Dismiss the Appeal or to Summarily Affirm the trial courts Order of June 27, 1989. On July 25, Mr. Borders filed a Motion to Stay Judge Oberdorfer's Order of June 27, 1989 along with a Motion to Intervene in the District Court. Mr. Borders also filed in this Court a Motion in Opposition to the Appellee's Motion to Expedite Consideration of its Motion to Dismiss or for Summary Affirmance.

On July 26, 1989, District Court Judge Louis F. Oberdorfer, denied Mr. Border's Motion to Stay Pending Appeal, but allowed his Motion to Intervene. A Memorandum Opinion was issued on July 26, 1989. See Exh. F. This Court denied the Impeachment Trial Committee's Motion to Expedite Consideration on that same day. See Exh. G. Mr. Borders appeared again before the Trial Committee on July 27, 1989, and again refused to testify since an appeal of the trial courts denial of his Motion to Stay was being prepared by counsel.

II. ARGUMENT

A. THE PRESENT APPEAL IS INAPPROPRIATE FOR SUMMARY AFFIRMANCE AND APPELLEE'S MOTION MUST BE DENIED.

In support of its position that this Court should summarily affirm the decision of Judge Oberdorfer (June 26, 1989), the Trial Committee relies on one case, Taxpayer's Watchdog, Inc. v. Stanley, 819 F.2d 294, 298. However, the Appellee fails to discuss the standard of review which this Court must apply in ruling on its motion. This standard of review is clearly set forth in Taxpayer's, but is ignored by the Appellee. In Taxpayer's, the Court states that a party seeking summary disposition of an appeal bears "the heavy burden of establishing that the merits of his care are so clear that expedited action is justified." Id. at 297. To summarily affirm an order of the District Court, this Court must (1) conclude "that no benefit will be gained from further briefing and argument of the issues presented" on appeal. Id at 298; (2) this Court also is obligated to view the record and inferences in the light most favorable to the Appellant, William A. Borders, Jr. Id. See Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.), cert. denied, 449 U.S. 994 (1980); Sills v. Bureau of Prisons, 761 F.2d 792, 793-94 (D.C. Cir. 1985); United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

In the instant case, the Appellee simply has not established his heavy burden and its motion is premature. No complete briefing on the merits has occurred in this case. Briefs are scheduled to be filed by August 8, 1989. Nor is there an in depth lower court written opinion which might be reviewed by this Court. To summarily affirm the District Court's order prior to a complete briefing of the case by both sides to this dispute would certainly be unfair to Mr. Borders who has a right to be heard and to have his day in Court. The Supreme Court of the United States has often held that a fundamental requirement of due process is the opportunity to be heard and it is an opportunity which must be granted at a meaningful time and in a meaningful manner. Parrat v. U.S., 451 U.S. 527, 540-1; Armstrong v. Manzo, 380 U.S. 545, 552 (1965); see Matthews v. Eldridge, 424 U.S. 319 (1976). As a matter of fundamental fairness, justice and due process of law, Mr. Borders, the subject of the non-ex parte proceeding below, should be allowed to perfect his appeal by putting this case in the posture necessary for the Court to make a well-informed and fair decision. The appropriate posture can only be achieved through a thorough briefing of all issues and the proper preparation and presentation of a complete record.

Once the Court has been briefed and a complete record is before it, the Court is obligated to view the record and inferences in the light most favorable to the Appellant. Without arguing the appeal here, the proper application of the preceding standard militates in the Appellants favor. (See Accompanying Motion to Stay Pending Appeal for argument on merits.) Contrary to the assertion of Appellee, if Mr. Borders is not allowed his day in Court, he is definitely prejudiced. In ruling that the District Court erred in not allowing a Defendant-Appellant to intervene in another case where an immunity order was requested and appealed, this Court held:

> The Court erred also in not allowing appellants to intervene as defendants. Orders against them were sought and obtained. If they had been valid, these orders might have compelled them to make disclosures that would have injured their reputations and so their economic and social interests. The law does not ignore such injuries.

In re McElrath, 248 F.2d 612, 616 (D.C. Cir. 1957). Analogously, if Mr. Borders is not allowed to litigate his appeal, the order issued by the District Court will compel him to make disclosures that are potentially self-incriminating, therefore doing damage to his reputation and to his social and economic interest. The Trial Committee and the Justice Department failed to comply with the requirements of § 6005(b)(3) and (c). The application for immunity was filed prior to proper waiver by the Attorney General. The statute does not allow a designee to waive the condition precedent for filing an application for an immunity order. It is true that at the writing of this response the ten day period has passed. This does not change the fact that the application was filed before June 18, 1989, the first date on which the application could have been legally filed. Because the Trial Committee filed the request on June 14, 1989, it violated the statute. Furthermore, since the Attorney General did not personally sign the waiver and no designee is allowed to do so under the statute, the grant of the immunity application is invalid. Accordingly, the Motion for Summary Affirmance should be denied.

B. THE APPELLEE'S ASSERTION THAT MR. BORDERS WAS NOT A PARTY BELOW IS MOOT.

On July 25, 1989, Mr. Borders filed a Motion to Intervene in the District Court. The Motion to Intervene was granted. Judge Oberdorfer wrote in his Memorandum Decision of July 26, 1989:

> As to intervention, Mr. Borders appeared personally with counsel at the June 26 hearing and his counsel argued in opposition to the Committee's request for a use immunity order. There was no formal motion for leave to intervene. However, his participation was a _de facto_ intervention which is formally ratified by an order entered earlier today granting him leave to intervene _nunc pro tunc_ to June 26, 1989.

See Exh. F. _See also_ _In re McElrath_, 248 F.2d 612, 616 (D.C. Cir. 1957) (Court of Appeals held that District erred by denying defendants the right to intervene for the purpose of contesting use immunity order.) Thus, the argument that Mr. Borders is not a party to this suit is moot. The grant of party status to Mr. Borders also moots the Appellee's argument that Mr. Borders has no personal stake in the matter of the legal propriety of granting the immunity order. This Court's decision in _In re Application of United States Senate Permanent_

Subcommittee on Investigations (Cammisano), 655 F.2d 1232, 1236-38 (D.C. Cir.), cert denied, 1st U.S. 1084 (1981), does not suggest a different position as is suggested by the Appellee.

III. THE NON-EX PARTE IMMUNITY ORDER IS A FINAL ORDER AND IS NOT INTERLOCUTORY.

The Appellee erroneously argues that the immunity order is an interlocutory order and therefore unappealable. An interlocutory order has been defined as:

> ... one which does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.

In re Kutner, 656 F.2d 1107, 1111 (4th Cir. 1981).

A final order or judgment has been defined as

> ... one which disposes of the whole subject, gives all the relief that was contemplated, provides with reasonable completeness, for giving effect to the judgment and leaves nothing to be done in the cause save [to] superintend, ministerially, the execution of the decree.

Id. at 1110. See also Moore's, Federal Practice, § 54.02 (ed. 1985); Garnes v. Gulf and Western Mfg. Co., 789 F.2d 637 (8th Cir. 1986) (A final decision generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment); Adams v. Ford Motor Credit Co., 556 F.2d 737 (3d Cir. 1977). See generally Black's Law Dictionary 731, 988.[1]

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[1] "A final order has been defined as follows: 'A decision which finally determines the rights of parties to secure in that suit the relief they seek is a "final decision". [citation omitted] An interlocutory order or decree is one which does not finally determine a cause of action but only decides some

The application for the immunity order was filed June 14, 1989. Refusing to allow an ex parte proceeding, the district court judge held a hearing during which both sides were heard on the merits of the application. Mr. Borders, through counsel, opposed the order and the Trial Committee had an opportunity to respond. No representation of the Department of Justice was present. The application for use immunity was approved on July 27, 1989. Mr. Borders appeared before the Trial Committee on July 24, 1989 and July 27, 1989. Once the immunity order was granted no further proceedings in court were necessary. The decision was final and Mr. Borders had no option to disobey the order. The legal process was complete once the court determined that the procedural requirements of § 6005(b)(3) had been met. There was nothing else to be decided or litigated. Thus, the use immunity application was granted as a final decision of the District Court. The Order of June 27, 1989 is final.

In its Motion to Dismiss, the Appellee cites no authority from this circuit which stands for the proposition that use immunity orders are interlocutory. Nor does the Appellee cite any authority that a use immunity order pursuant to §§ 6002 - 6005 is interlocutory. The majority of the cases on which Appellee relies concern ex parte motions to quash subpoenas. See Cobbledick v. United States, 309

(Footnote continued)

ntervening matter pertaining to the cause, and which requires further steps o be taken in order to enable the court to adjudicate the cause on the erits." Young Properties Corp. v. United Equity Corp., 534 F.2d 847 851 5th Cir. 1976).

U.S. 323 (1940); United States v. Ryan, 402 U.S. 530 (1971); Ullman v. United States, 350 U.S. 422 (1956). None of the cases cited by the Appellee contain substantive discussions on the appealability of use immunity orders under § 6005. Moreover, all of the cases cited were originally ex parte proceedings. Thus, only one interested party was heard.

This Court in the case of In re Robert McElrath allowed the appeal of a use immunity order from the District Court. The immunity order in question was requested in the District Court pursuant to 18 U.S.C. (supp. IV) § 3486, 68 Stat. 745 (Act of August 20, 1984). This was the predecessor statute to 18 U.S. §§ 6002 - 6005. McElrath, supra at 612-618. The facts of McElrath are not relevant. However, it is unquestionable that the immunity order which was issued by the district court and later contested by the defendants, after a motion to intervene had been erroneously denied, was successfully appealed to this Court. The appeal was not dismissed. Accordingly, the Appellee's Motion to Dismiss based upon the argument that the Order of June 27, 1989 is interlocutory should be denied as both premature and meritless.

IV. CONCLUSION

Predicated upon the aforegoing analysis, the Appellant, William A. Borders, Jr., respectfully requests that Appellee's Motion to Dismiss or to Summarily Affirm be denied.

Respectfully submitted,

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THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

William A. Borders, Jr.,)
Appellant,)
)
v.) No. 89-5189
)
Impeachment Trial Committee on)
the Articles Against Judge Alcee L.)
Hastings, United States Senate)
Appellee.)

APPELLANT'S MOTION FOR STAY PENDING APPEAL

Comes now, William A. Borders, Jr., by and through counsel, and moves this Honorable Court, pursuant to Rule 8 of the Federal Rules of Appellate Procedure and Rule 7(h) of the General Rules of the United States Court of Appeals for the District of Columbia, to stay the District Court's Order of June 27, 1989, requiring him to testify and provide information to the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings. The grounds in support of this motion are set forth more particularly in the accompanying Memorandum of Points and Authorities.

Respectfully,

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Dated: July 31, 1989

Attorneys for Appellant

THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

William A. Borders, Jr., Appellant, v. Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, United States Senate Appellee.	No. 89-5189

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF WILLIAM A. BORDERS' MOTION TO STAY ORDER OF JUNE 27, 1989 PENDING APPEAL

I. INTRODUCTION.

On June 7, 1989, the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings (hereinafter "the Trial Committee") adopted a resolution instructing the Senate Legal Counsel to apply for an order, pursuant to 18 U.S.C. § 6002 and § 6005, granting use immunity to William A. Borders, Jr., a potential witness at the Hastings impeachment trial. See Exh. A.

In accordance with 18 U.S.C. § 6005, the Trial Committee notified the Attorney General of its intention to request a use immunity order from the Federal District Court for the District of Columbia. This written notification to the Department of Justice is dated June 8, 1989. See Exh. B.

On June 9, 1989, the Senate Legal Counsel received a letter from the Department of Justice which purported to waive the provisions of 18 U.S.C. § 6005(b)(3) and (c). In the signature position was the name "Carol T. Crawford, Assistant Attorney General." The name was in typeface. The letter was signed by "John Mackey." See Exh. C.

On June 14, 1989, the Trial Committee filed an application for an order granting use immunity to Mr. Borders if he were called as a witness in the Hastings impeachment trial. On June 19, 1989, this Court issued an order requiring the parties to appear at a hearing on the matter.

The parties appeared before the Honorable Louis F. Oberdorfer, United States District Court Judge, on June 26, 1989, for a hearing. At the hearing, both the Appellant and the Appellee were present and represented by counsel. No representative of the Justice Department appeared. The Appellant objected to the Trial Committee's request for a grant of use immunity on the procedural grounds that the application failed to comport with the requirements set forth in 18 U.S.C. § 6005. Appellant argued that 18 U.S.C. § 6005(b)(3) and (c) had not been properly waived since waiver had not been effectuated by the Attorney General. The Court agreed with the Appellant's argument and the Appellee was offered an opportunity to rectify the procedural defect by having a presidential appointee in the Justice Department waive the requirements of 18 U.S.C. § 6005(b)(3) and (c).

The hearing was adjourned. On June 27, 1989, the Appellee filed documents with the District Court containing a second letter from the Justice Department signed by Carol T. Crawford, Assistant Attorney General. Again, this letter purports to exercise the Attorney General's sole prerogative of waiving 18 U.S.C. § 6005(b)(3) and (c). See Exh. D. By order of June 27, 1989, Judge Louis F. Oberdorfer granted the

Trial Committee's request giving use immunity to William A. Borders, a potential witness in the Hastings trial. The Order specifically states that the procedural requirements set forth in 18 U.S.C. § 6005 have been satisfied. See Exh. E. On July 6, 1989, William A. Borders, Jr. timely filed a Notice of Appeal in the United States Court of Appeals for the District of Columbia. On July 24, 1989, Mr. Borders appeared before the Trial Committee pursuant to its subpoena of July 19, 1989. Mr. Borders, because of his pending appeal, double jeopardy and cruel and unusual punishment refused to testify before the Trial Committee.

On July 24, 1989, the Trial Committee filed in this Court a Motion to Dismiss the Appeal or to Summarily Affirm the trial courts order of June 27, 1989. The Trial Committee also filed a Motion to Expedite Consideration of its Motion to Dismiss the Appeal or to Summarily Affirm the trial courts order of June 27, 1989. On July 25, Mr. Borders filed a Motion to Stay Judge Oberdorfer's Order of June 27, 1989 along with a Motion to Intervene in the District Court. Mr. Borders also filed in this Court a Motion in Opposition to the Appellee's Motion to Expedite Consideration of its Motion to Dismiss or for Summary Affirmance.

On July 26, 1989, the District Court, Judge Louis F. Oberdorfer, denied Mr. Border's Motion to Stay Pending Appeal, but allowed his Motion to Intervene. A Memorandum Opinion was issued on July 26, 1989. See Exh. F. This Court denied the Impeachment Trial Committee's Motion to Expedite Consideration on that same day. See Exh. G. Mr. Borders appeared again before the Trial Committee on July 27, 1989, and again refused to testify since an appeal of the trial court's denial of his Motion to Stay was being prepared by counsel. It is from the denial by the District Court of Appellant-Intervenor's Motion to Stay that this appeal is taken.

II. ARGUMENT.

Rule 8 of the Federal Rules of Appellate Procedure vests in this Court the power to stay an order pending appeal. The factors governing a stay pending appeal are as follows: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent the stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) whether the public interest is served by a grant of the stay. Hilton v. Braunskill, 481 U.S. 770, 773; see, e.g., Washington Metropolitan Area Comm'n v. Holiday Tours Inc., 559 F.2d 841, 842-844 (1977); Virginia Petroleum Jobbers Assn. v. FPC, 259 F.2d 921, 928 (1958); Sylvester v. Sylvester,865 F.2d 1164, 1163 (10th Cir. 1989) ("A District court or court of appeals may order a stay of the execution of a judgment pending appeal for any reason the court considers proper."); Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986); Accident Fund v. Baerwaldt, 579 F. Supp. 724, 725 (WD Mich 1984); see also Beverly v. United States, 468 F.2d 732, 741 (5th Cir. 1972); J.L. v. Parham, 412 F. Supp. 141, 142 (MD Ga. 1976); see generally 11 C. Wright and A. Miller, Federal Practice and Procedure § 2904 (1985).

The applicant asserts that the District Court erred in denying its Motion for Stay on July 26, 1989. We submit that all of the elements set forth above are soundly met by the applicant in this case.

A. THE APPLICANT FOR STAY PENDING APPEAL IS LIKELY TO SUCCEED ON THE MERITS IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

(1) THE DISTRICT COURT'S GRANT OF USE IMMUNITY PURSUANT TO TITLE 18 U.S.C. § 6005 WAS WHOLLY ERRONEOUS AND CONSTITUTES REVERSIBLE PROCEDURAL ERROR.

(a) The Trial Committee's Request for Use Immunity Fails to Comply With the Procedural Requirements of 18 U.S.C. § 6005.

Title 18 of the United States Code, § 6005 provides, inter alia:

> § 6005. Congressional proceedings
>
> (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States District Court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or to provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.
>
> (b) Before issuing an order under subsection (a) of this section, a United States District Court shall find that -
>
> > (2) in the case of a proceeding before a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee, and
> >
> > (3) ten days or more prior to the day on which the request for such an order was

> made, the Attorney General was served with notice of an intention to request the order[.]
>
> (c) Upon application to the Attorney General, the United States District Court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

The preceding statutory provisions govern grants of use immunity in cases where an individual may be called as a witness before a committee or subcommittee of the House or Senate or a joint committee of both Houses of Congress. The Trial Committee is a committee of the Senate and therefore comes within the purview of § 6005. It is settled law that a request for use immunity (18 U.S.C. § 6002 - § 6005) by a committee of a House of Congress is a constitutionally valid exercise of a statutory right. See In re Sealed Case, 791 F.2d 179; 180-181 (D.C. Cir. 1986); cert. denied, 479 U.S. 924 (1986); see also In re Sealed Case, 776 F.2d 335 (D.C. Cir. 1985); see generally P.A. Robinson, Criminal Law Defenses, 205 (Vol. 2) at 482-488 (1984).

It is equally clear that a request for use immunity must strictly comply with the requirements of 18 U.S.C. § 6005. The District Court "is to be a checkpoint" for ensuring that the procedural requirements of the provision have been met prior to the issuance of an order granting use immunity. Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270, 1278 (1973). The Court must "scrutinize the record to make certain that the congressional request for an immunity order is jurisdictionally and procedurally well-founded, and that the Attorney General has been notified." Id.

There are two procedural requirements under § 6005(b) which are applicable to the case sub judice: (a) the request for immunity must be approved by two-thirds of the full Committee (§ 6005(b)(2)); and (b) at least ten days prior to filing of the immunity request, the Committee must provide the Attorney General with notice of its intention to seek immunity for the witness (§ 6005(b)(3)). We submit that the Committee failed to comply with the 10-day notice requirement set out in § 6005(b)(3). Thus, the application for the use immunity request is procedural defective and should have been denied by the District Court.

On June 8, 1989, the Trial Committee properly notified, Richard Thornburgh, the Attorney General of the United States, of its intention to request an immunity order. See Exh. B. On June 9, 1989, a letter purporting to waive 18 U.S.C. § 6005(b)(3) and (c) was sent to Michael Davidson, Senate Legal Counsel. This letter was not signed by the Attorney General personally. It was signed by John Mackey for Carol T. Crawford, Assistant Attorney General. After the hearing on June 26, 1989, the Appellee submitted to the Court yet another letter purporting to waive 18 U.S.C. § 6005(b)(3) and (c). The letter was signed by "Carol T. Crawford, Assistant Attorney General." This letter was not personally signed by the Attorney General. On its face, § 6005(b)(3) does not specifically provide for a waiver of the 10-day notice provision. However, the decisional law of this circuit has interpreted § 6005(b)(3) to be directory and not mandatory. The Attorney General, in his discretion, may waive the provision since the provision inures only to the benefit of the Department of Justice. In re Application of the United States Permanent Subcommittee on Investigations (Cammisano), 655 F.2d 1232, 1235-1236 (D.C. Cir. 1981), cert. denied, 454 U.S. 1084 (1981); See Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270 (D.D.C. 1973); see also Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1282 (D.D.C. 1973).

There is no discussion in the case law indicating the circumstances which would justify a designee of the Attorney General acting in his stead. In Application of the United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1282 (D.D.C. 1973), the Attorney General, represented by the Watergate Prosecutor, Archibald Cox, waived the 10-day notice requirement of § 6005(b)(3) and the 20-day deferred period (§ 6005(c)) without objection.

We contend that the statute does not allow a designee of the Attorney General to act in his stead. Our construction of 18 U.S.C. § 6005(b)(3) and (c) is elucidated and supported by reading 18 U.S.C. § 6005 in pari materia with a related statute, 18 U.S.C. § 6003 which provides in toto:

> § 6003. Court and grand jury proceedings
>
> (a) In the case of an individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States District Court for the judicial district in which the proceedings is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses

> to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in § 6002 of this part.
>
> (b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) to this section when in his judgment -
>
> > (1) the testimony or other information from such individual may be necessary to the public interest; and
> >
> > (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

It must be noted that § 6003(b) specifically provides that the approval of a request for an immunity order from a court must first have the approval of "the Attorney General, the Deputy Attorney General or any designated Attorney General." The United States Attorney requesting the order must, as required by subsection (b), seek such approval prior to filing the application in court under subsection (a). Both § 6003 and § 6005 are related statutes which regulate the grant of use immunity before judicial or quasi-judicial bodies. In § 6003 it is clear that Congress did not intend the Attorney General himself to be the sole repository of power when it comes to approving or disapproving a United States attorney's initial request, prior to filing the request with a court, for a use immunity order under § 6003(a). The power can be exercised by a Deputy Attorney General or a designated Assistant Attorney General. A designee is therefore allowed and sanctioned by the statute. Though § 6003 and § 6005 concern different proceedings, the proper construction of § 6005 when read in pari materia with § 6003 must force the court to the ineluctable conclusion that Congress did not intend anyone except the Attorney General to exercise the authority set forth in § 6005.

Thus, the canon of statutory interpretation, expressio unius est exclusio alterius should be applied. It holds that the expression of the one thing means the exclusion of another thing. There is an inference that all omissions from a statute are understood as exclusions. See Botony Worsted Mills v. United States, 278 U.S. 282, 289 (1929); Tennessee Valley Authority v. United States, 437 U.S. 153, 187-88 (1978); Broom's Legal Maxims 453 (12th Ed. 1960); see also IA Sutherland, Statutes and Statutory Construction, 47.23 (4th ed. 1984); 73 Am. Jur. 2d Statutes 211 (1974). Congress did not indicate that anyone other than the Attorney General could exercise the authority in § 6005(b)(3) and (c). No reference to a designee of the Attorney General is found in the statute. Its express omission is reflexive of congressional intent. There is nothing peculiarly legal about the application of the maximum expressio unius est exclusio alterius in the instant case. It is a product of "legal and common sense." Broom's, supra at 453. "It expresses the learning of common experience that generally when people say one thing, they do not mean something else." Sutherland, supra at 127. If Congress had intended a designee to exercise the power set forth in § 6005(b)(3) and (c), it would have specifically stated so on the face of the statute. It unquestionably set out who could exercise approval authority under § 6003(b). Consequently, the letter of June 26, 1989, fails to waive the procedural requirements articulated in §

6005(b)(3) and (c). Nothing in the legislative history of the act or the decisional law would dictate a different result. See 1970 U.S. Code Cong. and Adm. News, p. 4007.

(b) Even If a Designee Does Have the Authority to Waive 18 U.S.C. § 6005(b)(3) and (c), the Letter of June 26, 1989, From The Department of Justice is Inadequate.

It has been established, supra, that the Attorney General has the power to waive the 10-day notice provision of § 6005(b)(3) and the 20-day notice provision of § 6005(c). However, Appellant submits that the letter of Assistant Attorney General, Carol T. Crawford fails to effectively and legally serve as a waiver. (See Exh. D). The letter states:

June 26, 1989

Michael Davidson, Esquire
Senate Legal Counsel
Room 642
Senate Hart Office Building
Washington, D.C. 20510-7250

Dear Mr. Davidson:

This is in response to your notice dated June 8, 1989, to Attorney General Thornburgh of the intention of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings to apply for an immunity order for William A. Borders, Jr.

The Department of Justice has no objection to the proposed order to compel the testimony of William A. Borders, Jr. and hereby waives the provisions of 18 U.S.C. Section 6005(b)(3) and (c).

By letter of June 9, 1989, the Department of Justice previously responded to your inquiry under the signature of John P. Mackey, Deputy Assistant Attorney General in this office, who was authorized to sign in my absence.

However, to alleviate any concerns the court might have on the Department's views as expressed in the June 9th letter, I again state those views herein.

Sincerely,

Carol T. Crawford
Assistant Attorney General

There is nothing in the record or in the letter which indicates that Ms. Crawford has been duly authorized to act as the Attorney General's designee. There is no evidence that the Attorney General has seen the request or has discussed it with Ms. Crawford. There is no evidence that the Attorney General was unavailable to review the request. There is simply no way to determine if Ms. Crawford is a designee, nor does she assert that she is the designee in the letter. The fact that she is a presidential appointee is not dispositive of the problem. All U.S. Attorneys are presidential designees. A U.S. Attorney who works for the Department of Education is a presidential designee. This fact would not give him authority to waive the provisions of § 6005(b)(3) and (c). The statute is silent as to whom a designee of the Attorney General must be or whether there may be a designee.

The wiretap case of United States v. Giordono, 416 U.S. 505 (1974), is similar to this case and is instructive. In Giordono, the Supreme Court of the United States strictly construed 18 U.S.C. § 2516(1) (Title III of the Omnibus Crime Control and Safe Streets Act of 1986). § 2616 states, *inter alia*:

> [T]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal Judge ... for ... an order authorizing or approving the interception of wire or oral communications.

The Defendant Giordono, a narcotics dealer, challenged evidence derived from a wiretap by the FBI on his telephone. During the suppression hearings, it developed that the initial wiretap had been authorized by the Attorney General's Executive Assistant, not the Attorney General or his special designated Assistant Attorney General. U.S. v. Giordono, 416 at 510. After a careful review of the statute's legislative history and a thorough analysis of § 2516(1), the Supreme Court held that Congress did not intend the power to authorize wiretap applications to be exercised by any individuals other than the Attorney General or an Assistant Attorney General specially designated by him. Id. at 512-523. Section 2516(1) was intended to limit the power to authorize wiretap applications to the Attorney General and to any Assistant Attorney General he might designate. Id. at 512-514. The purpose of restricting approval of wiretap applications to the Attorney General or his specially designated Assistant Attorney General was to make sure that this critical act of judgment, affecting individual civil rights, was the exercise or mature judgment by a responsible official in the Department of Justice. Id. at 516, 517-518. Accordingly, the authorization or approval of the wiretap application by the Attorney General's Executive Assistant contravened 18 U.S.C. § 2516(1). All evidence derived as a result of such approvals was suppressed.

By analogy, if a designee under § 6005(b)(3) waives the 10-day notice rule, the identity of the designee must be clear and ascertainable. There should be no question as to whether the official is the proper designee of the Attorney General. The rationale of

Giordono is applicable here. The individual waiving the 10-day notice period should be a mature, responsible official capable of properly exercising critical judgment as to whether the provision should be waived. We cannot be certain that Carol T. Crawford is such an individual. The legislative purpose of § 6005(b)(3) indicates that this is an important provision. It provides the Department of Justice time to lobby for a change of minds on the part of the Congressional Committee, should the Attorney General object to the grant of immunity. It also gives the Attorney General an opportunity to insulate from a grant of immunity any incriminating data already in his files prior to the witness' testimony. Cammisano, 665 F.2d at 1236.

We submit that the letter of June 26, 1989, sorely fails to reveal whether Carol T. Crawford is authorized to waiver the 10-day notice provision. Consequently, the 10-day notice procedural requirement of § 6005(b)(3) has not been met. The application for immunity was filed too early. The application for an order granting use immunity to Mr. Borders was filed on June 14, 1989. Notice of intent to request the order was given to the Attorney General on June 8, 1989. The application should not have been filed with the Court prior to June 18, 1989, 10-days after notice was given to the Attorney General. Furthermore, a fortiori, the letter did not effectively waive § 6005(c) which allows the Attorney General to request that the District Court defer subsection (a) for a period, not longer than 20-days from the date of the request for such order. However, § 6005(c) unlike § 6005(b)(3) is not a condition precedent for filing the request for use immunity order with the District Court. Nevertheless, it was not effectively waived. Thus, the applicant has made a strong showing that his appeal is likely to succeed on its merit.

B. THE APPLICANT WILL BE IRREPARABLY INJURED ABSENT A STAY PENDING APPEAL.

Contrary to the District Court judge's Order of June 27, 1989, the applicant for stay asserts that the procedural requirements of 18 U.S.C. § 6005(b)(3) and (c) have not been met and therefore the application for use immunity, approved by Judge Oberdorfer, should have been denied, as was done in the first instance at the Hearing on the Trial Committee's first application held June 26, 1989. Though the applicant has appealed the District Court's order, Mr. Borders has been subpoenaed to testify before the Trial Committee. He has appeared before the Trial Committee on July 24 and 27, 1989. Thus, a stay pending appeal is necessary in order to maintain the status quo and to prevent the issue raised on appeal from becoming moot during the appeal process. Therefore, Mr. Borders would be irreparably harmed if he is required to give testimony before the Trial Committee, since it would have the effect of negating his appeal. If Mr. Borders is forced to testify before the Trial Committee, such potential self-incriminating testimony could never be erased. A subsequent successful decision on appeal would be a hollow and pyrrhic victory.

C. A STAY PENDING APPEAL WILL NOT INJURE THE IMPEACHMENT TRIAL COMMITTEE.

The Trial Committee is ably represented by legal counsel and should not have had problems meeting the procedural requirements of 18 U.S.C. § 6005(b)(3) and (c). The Trial Committee's legal counsel is certainly charged with actual or constructive knowledge of the proper procedure used to waive the requirements of the statute. Yet, counsel for the Trial Committee and the Department of Justice have failed to properly and legally execute a waiver of § 6005(b)(3) and (c). The Justice Department has had two opportunities to effect a legally cognizable or valid waiver and both attempts have fallen short of the legal mark. It is not the fault of the applicant that the other parties to this proceeding have not moved competently to waive the requirements of the statute. The present litigation in this Court has been precipitated by the procedural ineptitude of the Trial Committee and the Justice Department. The applicant for stay is blameless. Consequently, any burden to be borne must be placed squarely on the shoulders of the Trial Committee or the Department of Justice if the equities are to be properly and fairly balanced.

No irreparable harm could possibly come to the Trial Committee. The Trial Committee may ultimately have another opportunity to correct the procedural mishap it created. The Congress, after careful study, enacted § 18 U.S.C. §§ 6002 - 6005. See Measures Relating to Organized Crime, Hearing on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122 and S. 2292 Before the Subcommittee on Criminal Law and Proceeding of the Senate Committee on the

Judiciary, 91st Cong. 1st Sess. 292 (1969) (draft provision §4). See also S Rep. No. 617, 91st Cong., 1st Sess. 55 (1969); see generally II Working Papers, National Commission on Reform of Federal Criminal Law 1406 (1970). Accordingly, the Trial Committee and the Justice Department must be required to rigidly adhere to the procedure set forth in the statute, lest the importance of 18 U.S.C. § 6005 be denigrated and the intention of its framers disrespected and belittled.

D. THE PUBLIC INTEREST WILL BE SERVED BY THE STAY PENDING APPEAL.

Finally, the public interest will be served by this Court's grant of a stay. The people have vested in Congress, through the constitution, the power and legislative authority to promulgate law. Congress has done so in the instant case. It has promulgated 18 U.S.C. § 6005 which enumerates specific procedural safeguards. These safeguards must be complied with before an application for use immunity may be filed and approved. The Trial Committee and Justice Department have not complied with the requirements of the law. By granting the applicants stay pending appeal, the Court speaks for the people. It orders the government to act in accordance with those laws which have been passed for the protection of the citizenry. The Court acts as a public watchdog and the public interest is vindicated; justice prevails. The people are therefore assured that it may rely on the Courts to require the government to respect and comply with the rule of law.

III. CONCLUSION.

Accordingly, predicated upon the aforegoing analysis, the applicant for stay pending appeal respectfully requests that its motion for stay be allowed.

Respectfully submitted,

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IN THE UNITED STATES
COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA

NO. 89-5189

WILLIAM A. BORDERS, JR.

Appellant,

v.

IMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST
JUDGE ALCEE L. HASTINGS

Appellee.

Appeal From the United States District Court
for the District of Columbia

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August 4, 1989

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

William A. Borders, Jr.,)
Appellant,)
)
v.) No. 89-5189
)
Impeachment Trial Committee on)
the Articles Against Judge Alcee)
L. Hastings, United States Senate)
Appellee.)

APPELLANT'S CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The Appellant's-Intervenor makes the following statement and files this Certificate pursuant to Rule 28 of the Federal Rules of Appellate Procedure and Rule 11 of the General Rules of the United States Court of Appeals for the District of Columbia.

(1) The parties to the above-captioned matter are William A. Borders, Jr., Appellant-Intervenor and the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings. Both parties appeared below in the Federal District Court before Judge Louis F. Oberdorfer (Misc. No. 89-129-LFO).

(2) The ruling under review is the Order of June 27, 1989 of District Court Judge Louis F. Oberdorfer granting the Trial Committee's Application for Immunity for Mr. William A. Borders, Jr. The District Court's Order of June 27, 1989 appears in the Appendix to the Brief for the Appellant as Exh. E. The Order is unpublished and no official citation exists for the ruling.

(3) The Appeal has not previously been before this Court or any other court. There are no related cases involved in the appeal.

Michael Rosier, Esq.

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II. ISSUE PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT'S GRANT OF APPELLEE'S APPLICATION REQUESTING USE IMMUNITY, PURSUANT TO TITLE 18 U.S.C., § 6005, FOR WILLIAM A. BORDERS, JR., CONSTITUTES REVERSIBLE ERROR WHERE THE REQUEST FAILS TO COMPLY WITH THE PROCEDURAL REQUIREMENTS OF THE STATUTE.

III. STATEMENT OF THE CASE

On June 7, 1989, the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings (hereinafter "the Trial Committee") adopted a resolution instructing the Senate Legal Counsel to apply for an order, pursuant to 18 U.S.C. § 6002 and § 6005, granting use immunity to William A. Borders, Jr., a potential witness at the Hastings impeachment trial. See Appendix, Exh. A.

In accordance with 18 U.S.C. § 6005, the Trial Committee notified the Attorney General of its intention to request a use immunity order from the Federal District Court for the District of Columbia. This written notification to the Department of Justice is dated June 8, 1989. See Appendix, Exh. B.

On June 9, 1989, the Senate Legal Counsel received a letter from the Department of Justice which purported to waive the provision of 18 U.S.C. § 6005(b)(3) and (c). In the signature position was the name "Carol T. Crawford, Assistant Attorney General." The name was in typeface. The letter was signed by "John Mackey." See Appendix, Exh. C.

On June 14, 1989, the Trial Committee filed an application for an order granting use immunity to Mr. Borders if he were called as a witness in the Hastings impeachment trial. On June 19, 1989, this Court issued an order requiring the parties to appear at a hearing on the matter.

The parties appeared before the Honorable Louis F. Oberdorfer, United States District Court Judge, on June 26, 1989, for a hearing. At the hearing, both the Appellant and the Appellee were present and represented by counsel. No representative of the Justice Department appeared. See Appendix, Tr. of Hearing at 6. The Appellant objected to the Trial Committee's request for a grant of use immunity on the procedural grounds that the application failed to comport with the requirements set forth in 18 U.S.C. § 6005. Appellant argued that 18 U.S.C. § 6005(b)(3) and (c) had not been properly waived since waiver had not been effectuated by the Attorney General. The Court agreed with the Appellant's argument and the Appellee was offered an opportunity to rectify the procedural defect by having a presidential appointee in the Justice Department waive the requirements of 18 U.S.C. § 6005(b) (3) and (c). See Appendix, Tr. of Hearing at 10-11.

The hearing was adjourned. On June 27, 1989, the Appellee filed documents with the District Court containing a second letter from the Justice Department signed by Carol T. Crawford, Assistant Attorney General. Again, this letter purports to exercise the Attorney General's sole prerogative of waiving 18 U.S.C. § 6005(b)(3) and (c). See Appendix, Exh. D. By order of June 27, 1989, Judge Louis F. Oberdorfer granted the Trial Committee's request giving use immunity to William A. Borders, a potential witness in the Hastings trial. The order specifically states that the procedural requirements set forth in 18 U.S.C. § 6005 have been satisfied. See Appendix, Exh. E. On July 6, 1989, Mr. Borders timely filed a Notice of Appeal in U.S. Court of Appeals for the District of Columbia.

On July 24, 1989, the Trial Committee filed in this Court a Motion to Dismiss the Appeal or to Summarily Affirm the trial courts order of June 27, 1989. The Trial Committee also filed a Motion to Expedite Consideration of its Motion to Dismiss the Appeal or to Summarily Affirm the trial courts order of June 27, 1989. On July 25, Mr. Borders filed a Motion to Stay Judge Oberdorfer's Order of June 27, 1989 along with a Motion to Intervene in the District Court. Mr. Borders also filed in this Court a Motion in Opposition to the Appellee's Motion to Expedite Consideration of its Motion to Dismiss or for Summary Affirmance.

On July 26, 1989, the District Court, Judge Louis F. Oberdorfer, denied Mr. Border's Motion to Stay Pending Appeal, but allowed his Motion to Intervene. A Memorandum Opinion was issued on July 26, 1989. See Exh. F. This Court denied the Impeachment Trial Committee's Motion to Expedite Consideration on that same day. See Exh. G. Mr. Borders appeared again before the Trial Committee on July 27, 1989, and again refused to testify since an appeal of the trial courts denial of his Motion to Stay was being prepared by counsel. Jurisdiction of the District of Columbia was predicated upon 18 U.S.C. §§ 6002 - 6005. It is from this wholly erroneous judicial ruling that the Appellant takes this appeal and claims reversible procedural error.

IV. ARGUMENT

THE DISTRICT COURT'S GRANT OF USE IMMUNITY PURSUANT TO TITLE 18 U.S.C. § 6005 WAS WHOLLY ERRONEOUS AND CONSTITUTES REVERSIBLE PROCEDURAL ERROR.

(A) The Trial Committee's Request for Use Immunity Fails to Comply With the Procedural Requirements of 18 U.S.C. § 6005.

Title 18 of the United States Code, § 6005 provides, *inter alia*:

> § 6005. Congressional proceedings
>
> (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or to provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.
>
> (b) Before issuing an order under subsection (a) of this section, a United States district court shall find that -
>
>> (2) in the case of a proceeding before a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee, and
>>
>> (3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order[.]
>
> (c) Upon application to the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

The preceding statutory provisions govern grants of use immunity in cases where an individual may be called as a witness before a committee or subcommittee of the House or Senate or a joint committee of both Houses of Congress. The Trial Committee is a committee of the Senate and therefore comes within the purview of § 6005. It is settled law that a request for use immunity (18 U.S.C. § 6002 - § 6005) by a committee of a House of Congress is a constitutionally valid exercise of a statutory right. See In re Sealed Case, 791 F.2d 179; 180-181 (D.C. Cir. 1986); cert. denied, 479 U.S. 924 (1986); see also In re Sealed Case, 776 F.2d 335 (D.C. Cir. 1985); see generally P.A. Robinson, Criminal Law Defenses, 205 (Vol. 2) at 482-488 (1984).

It is equally clear that a request for use immunity must strictly comply with the requirements of 18 U.S.C. § 6005. The District Court "is to be a checkpoint" for ensuring that the procedural requirements of the provision have been met prior to the issuance of an order granting use immunity. Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270, 1278 (1973). The Court must "scrutinize the record to make certain that the congressional request for an immunity order is jurisdictionally and procedurally well-founded, and that the Attorney General has been notified." Id.

There are two procedural requirements under § 6005(b) which are applicable to the case sub judice: (a) the request for immunity must be approved by two-thirds of the full Committee (§ 6005(b)(2)); and (b) at least ten days prior to filing of the immunity request, the

Committee must provide the Attorney General with notice of its intention to seek immunity for the witness (§ 6005(b)(3)). We submit that the Committee failed to comply with the 10-day notice requirement set out in § 6005(b)(3)). Thus, the application for the use immunity request is procedural defective and should have been denied by the District Court.

On June 8, 1989, the Trial Committee properly notified, Richard Thornburgh, the Attorney General of the United States, of its intention to request an immunity order. See Appendix, Exh. B. On June 9, 1989, a letter purporting to waive 18 U.S.C. § 6005(b)(3) and (c) was sent to Michael Davidson, Senate Legal Counsel. This letter was not signed by the Attorney General personally. It was signed by John Mackey for Carol T. Crawford, Assistant Attorney General. After the hearing on June 26, 1989, the Appellee submitted to the Court yet another letter purporting to waive 18 U.S.C. § 6005(b)(3) and (c). The letter was signed by "Carol T. Crawford, Assistant Attorney General." This letter was not personally signed by the Attorney General. On its face, § 6005(b)(3) does not specifically provide for a waiver of the 10-day notice provision. However, the decisional law of this circuit has interpreted § 6005(b)(3) to be directory and not mandatory. The Attorney General, in his discretion, may waive the provision since the provision inures only to the benefit of the Department of Justice. In re Application of the United States Permanent Subcommittee on Investigations (Cammisano), 655 F.2d 1232, 1235-1236 (D.C. Cir. 1981), cert. denied, 454 U.S. 1084 (1981); See Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270 (D.D.C. 1973); see also Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1282 (D.D.C. 1973).

There is no discussion in the case law indicating the circumstances which would justify a designee of the Attorney General acting in his stead. In Application of the United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1282 (D.D.C. 1973), the Attorney General, represented by the Watergate Prosecutor, Archibald Cox, waived the 10-day notice requirement of § 6005(b)(3) and the 20-day deferred period (§ 6005(c)) without objection.

We contend that the statute does not allow a designee of the Attorney General to act in his stead. Our construction of 18 U.S.C. § 6005(b)(3) and (c) is elucidated and supported by reading 18 U.S.C. § 6005 in pari materia with a related statute, 18 U.S.C. § 6003 which provides in toto:

> § 6003. Court and grand jury proceedings
>
> (a) In the case of an individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States District Court for the judicial district in which the proceedings is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.
>
> (b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) to this section when in his

judgment -

> (1) the testimony or other information from such individual may be necessary to the public interest; and
>
> (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

It must be noted that § 6003(b) specifically provides that the approval of a request for an immunity order from a court must first have the approval of "the Attorney General, the Deputy Attorney General or any designated Attorney General." The United States Attorney requesting the order must, as required by subsection (b), seek such approval prior to filing the application in court under subsection (a). Both § 6003 and § 6005 are related statutes which regulate the grant of use immunity before judicial or quasi-judicial bodies. In § 6003 it is clear that Congress did not intend the Attorney General himself to be the sole repository of power when it comes to approving or disapproving a United States attorney's initial request, prior to filing the request with a court, for a use immunity order under § 6003(a). The power can be exercised by a Deputy Attorney General or a designated Assistant Attorney General. A designee is therefore allowed and sanctioned by the statute. Though § 6003 and § 6005 concern different proceedings, the proper construction of § 6005 when read in pari materia with § 6003 must force the court to the ineluctable conclusion that Congress did not intend anyone except the Attorney General to exercise the authority set forth in § 6005.

Thus, the canon of statutory interpretation, expressio unius est exclusio alterius should be applied. It holds that the expression of the one thing means the exclusion of another thing. There is an inference that all omissions from a statute are understood as exclusions. See Botony Worsted Mills v. United States, 278 U.S. 282, 289 (1929); Tennessee Valley Authority, 437 U.S. 153, 187-88 (1978); Broom's Legal Maxims 453 (12th Ed. 1960); See also IA Sutherland, Statutes and Statutory Construction, 47.23 (4th ed. 1984); 73 Am. Jur. 2d Statutes 211 (1974). Congress did not indicate that anyone other than the Attorney General could exercise the authority in § 6005(b)(3) and (c). No reference to a designee of the Attorney General is found in the statute. Its express omission is reflexive of congressional intent. There is nothing peculiarly legal about the application of the maximum expressio unius est exclusio alterius in the instant case. It is a product of "legal and common sense." Broom's, supra at 453. "It expresses the learning of common experience that generally when people say one thing, they do not mean something else." Sutherland, supra at 127. If Congress had intended a designee to exercise the power set forth in § 6005(b)(3) and (c), it would have specifically stated so on the face of the statute. It unquestionably set out who could exercise approval authority under § 6003(b). Consequently, the letter of June 26, 1989, fails to waive the procedural requirements articulated in § 6005(b)(3) and (c). Nothing in the legislative history of the act or the decisional law would dictate a different result. See 1970 U.S. Code Congressional Adm. News, p. 4007.

(B) Even if a Designee Does Have the Authority to Waive 18 U.S.C. § 6005(b)(3) and (c), the Letter of June 26, 1989, From the Department of Justice is Inadequate.

It has been established, *supra*, that the Attorney General has the power to waive the 10-day notice provision of § 6005(b)(3) and the 20-day notice provision of § 6005(c). However, Appellant submits that the letter of Assistant Attorney General, Carol T. Crawford fails to effectively and legally serve as a waiver. (*See* Appendix, Exh. D). The letter states:

> June 26, 1989
>
> Michael Davidson, Esquire
> Senate Legal Counsel
> Room 642
> Senate Hart Office Building
> Washington, D.C. 20510-7250
>
> Dear Mr. Davidson:
>
> This is in response to your notice dated June 8, 1989, to Attorney General Thornburgh of the intention of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings to apply for an immunity order for William A. Borders, Jr.
>
> The Department of Justice has no objection to the proposed order to compel the testimony of William A. Borders, Jr. and hereby waives the provisions of 18 U.S.C. Section 6005(b)(3) and (c).
>
> By letter of June 9, 1989, the Department of Justice previously responded to your inquiry under the signature of John P. Mackey, Deputy Assistant Attorney General in this office, who was authorized to sign in my absence.
>
> However, to alleviate any concerns the court might have on the Department's views as expressed in the June 9th letter, I again state those views herein.
>
> Sincerely,
>
> Carol T. Crawford
> AssistantAttorneyGeneral

There is nothing in the record or in the letter which indicates that Ms. Crawford has been duly authorized to act as the Attorney General's designee. There is no evidence that the Attorney General has seen the request or has discussed it with Ms. Crawford. There is no evidence that the Attorney General was unavailable to review the request. There is simply no way to determine if Ms. Crawford is a designee, nor does she assert that she is the designee in the letter. The fact that she is a presidential appointee is not dispositive of the problem. All U.S. Attorneys are presidential designees. A U.S. Attorney who works for the Department of Education is a presidential designee. This fact would not give him authority to waive the provisions of § 6005(b)(3) and (c). The statute is silent as to whom a designee of the Attorney General must be or whether there may be a designee.

The wiretap case of United States v. Giordono, 416 U.S. 505 (1974), is similar to this case and is instructive. In Giordono, the Supreme Court of the United States strictly construed 18 U.S.C. § 2516(1) (Title III of the Omnibus Crime Control and Safe Streets Act of 1986). § 2616 states, inter alia:

> [T]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal Judge ... for ... an order authorizing or approving the interception of wire or oral communications.

The Defendant Giordono, a narcotics dealer, challenged evidence derived from a wiretap by the FBI on his telephone during the suppression hearings, it developed that the initial wiretap had been authorized by the Attorney General's Executive Assistant, not the Attorney General or his specially designated Assistant Attorney General. U.S. v. Giordono, 416 at 510. After a careful review of the statute's legislative history and a thorough analysis of § 2516(1), the Supreme Court held that Congress did not intend the power to authorize wiretap applications to be exercised by any individuals other than the Attorney General or an Assistant Attorney General specially designated by him. Id. at 512-523. Section 2516(1) was intended to limit the power to authorize wiretap applications to the Attorney General and to any Assistant Attorney General he might designate. Id. at 512-514. The purpose of restricting approval of wiretap applications to the Attorney General or his specially designated Assistant Attorney General was to make sure that this critical act of judgment, affecting individual civil rights, was the exercise or mature judgment by a responsible official in the Department of Justice. Id. at 516, 517-518. Accordingly, the authorization or approval of the wiretap application by the Attorney General's Executive Assistant contravened 18 U.S.C. § 2516(1). All evidence derived as a result of such approvals was suppressed.

By analogy, if a designee under § 6005(b)(3) waives the 10-day notice rule, the identity of the designee must be clear and ascertainable. There should be no question as to whether the official is the proper designee of the Attorney General. The rationale of Giordono is applicable here. The individual waiving the 10-day notice period should be a mature, responsible official capable of properly exercising critical judgment as to whether the provision should be waived. We cannot be certain that Carol T. Crawford is such an individual. The legislative purpose of § 6005(b)(3) indicates that this is an important provision. It provides the Department of Justice time to lobby for a change of minds on the part of the Congressional Committee, should the Attorney General object to the grant of immunity. It also gives the Attorney General an opportunity to insulate from a grant of immunity any incriminating data already in his files prior to the witness' testimony. Cammisano, 665 F.2d at 1236.

We submit that the letter of June 26, 1989, sorely fails to reveal whether Carol T. Crawford is authorized to waiver the 10-day notice provision. Consequently, the 10-day notice procedural requirement of § 6005(b)(3) has not been met. The application for immunity was filed too early. The application for an order granting use immunity to Mr. Borders was filed on June 14, 1989. Notice of intent to request the order was given to the Attorney General on June 8, 1989. The application should not have been filed with the Court prior to June 18, 1989, 10-days after notice was given to the Attorney General. Furthermore, a fortiori, the letter did not effectively waive § 6005(c) which allows the Attorney General to request that the district court defer subsection (a) for a period, not longer than 20-days from the date of the request for such order. However, § 6005(c) unlike § 6005(b)(3) is not a con- dition precedent for filing the request for use immunity order with the District Court. Nevertheless, it was not effectively waived.

VI. CONCLUSION

Accordingly, for the reasons set forth above, William A. Borders, Jr. respectfully requests that the District Court's decision of June 27, 1989 be reversed and the application of the Trial Committee be denied.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5189

IN THE MATTER OF THE APPLICATION OF
THE IMPEACHMENT TRIAL COMMITTEE ON THE
ARTICLES AGAINST JUDGE ALCEE L. HASTINGS

APPEAL OF WILLIAM A. BORDERS, JR.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OPPOSITION OF APPELLEE IMPEACHMENT TRIAL COMMITTEE TO THE MOTION OF WILLIAM A. BORDERS, JR., FOR A STAY PENDING APPEAL

The Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings ("Impeachment Trial Committee" or "Committee") files this memorandum in opposition to the motion of William A. Borders, Jr., for a stay pending appeal of the district court's immunity order of June 27, 1989. The order provides, after "determining that the procedural requirements set forth in 18 U.S.C. § 6005 have been satisfied," that "William A. Borders, Jr., may not refuse to testify, and provide other information, at proceedings of the [Committee], on the basis of his privilege against self-incrimination."1/

1/ Exh. 1. Exhibits 1 through 10 have been submitted to this Court in support of the Motion of Appellee Impeachment Trial Committee to Dismiss or, in the Alternative, to Summarily Af-
(footnote continued)

Before turning to our arguments in opposition to the motion for a stay, we will bring the Court up to date on the Committee's efforts to obtain Mr. Borders' testimony. After Mr. Borders refused on July 24, 1989, notwithstanding the communication to him of the district court's June 27, 1989 immunity order, to answer the Committee's substantive questions, the Committee directed him to appear again before it on July 27, 1989. At the July 24, 1989 hearing, Mr. Borders' counsel stated that they would file for a stay the following day. One purpose for asking Mr. Borders to return to the Committee on July 27, 1989, rather than taking immediate action in response to his refusal to answer the Committee's questions, was to provide an opportunity for Mr. Borders to make that stay application.

On July 24, 1989, the Committee filed a motion in this Court to dismiss or, in the alternative, for summary affirmance. The Committee also filed a motion to expedite the consideration of its motion. Mr. Borders opposed the motion to expedite and moved to extend the time for his response to the underlying motion to dismiss or affirm. This Court, on July 26, 1989, denied both the motion to expedite and the motion for an extension. In explaining why the Committee would not suffer irreparable injury absent expedition, this Court "note[d] that if appellant refuses to comply with [the]

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firm. Additional exhibits, starting with Exhibit 11, are appended to this opposition.

district court's order filed June 27, 1989, appellee may seek enforcement through civil contempt proceedings. See United States Senate Permanent Subcommittee on Investigations, 655 F.2d 1232, 1238 (D.C. Cir. 1981)." (Exh. 11).

On July 26, 1989, the district court denied Mr. Borders' motion for a stay pending appeal. (Exh. 12). The district court concluded that

> It is unlikely that Mr. Borders will prevail on the merits of his appeal for, among other reasons, 18 U.S.C. § 6005(b)[3] is designed to protect the Attorney General's interests -- not that of the prospective witness. Moreover, the Department of Justice has now had more than ten days to protect its interest so that any defect in the notice or the waiver is of no material consequence to Mr. Borders.

(Exh. 13).[2/] Mr. Borders filed a notice of appeal from the denial of the stay (docketed in this Court on July 27, 1989, as No. 89-5215) and filed this stay application on July 31, 1989. In the meantime, he returned as required before the Committee on July 27, 1989, but, asserting rights under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments, continued to refuse to answer the Committee's questions.

On August 1, 1989, the Committee reported to the Senate a resolution pursuant to 2 U.S.C. §§ 288b(b) and 288d (1988) and 28 U.S.C. § 1365 (Supp. V 1987) to direct the Senate Legal Counsel to commence a civil action to enforce the Committee's

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[2/] The reference in the district court's memorandum to 18 U.S.C. § 6005(b)(2) should be to § 6005(b)(3).

subpoena. The Senate agreed to the resolution, Senate Resolution 162 of the 101st Congress, on August 3, 1989. Exh. 14; see 135 Cong. Rec. S10012-13 (daily ed. Aug. 3, 1989)(text of resolution and statement of Sen. Mitchell). On August 4, 1989, the Committee filed an application in the district court for the civil enforcement of its subpoena to Mr. Borders. The district court, in an order entered that day, ordered Mr. Borders to show cause by August 14, 1989, why it should not order him to appear forthwith before the Committee to answer the Committee's and the parties' questions. The matter will be heard on August 17, 1989. (Exh. 15).

THE MOTION FOR AN INJUNCTION PENDING APPEAL SHOULD BE DENIED

A movant for an injunction pending appeal has the "burden of showing that exercise of the court's extraordinary injunctive powers is warranted." Cuomo v. United States Nuclear Regulatory Commission, 772 F.2d 972, 974 (D.C. Cir. 1985). In assessing motions for injunctions, the court considers "(i) the likelihood that the moving party will prevail on the merits; (ii) the prospect of irreparable injury to the moving party if relief is withheld; (iii) the possibility of harm to other parties if relief is granted; and (iv) the public interest." D.C. Cir. Rule 7(h)(1)(A).

1. It Is Unlikely That The Witness Will Prevail On the Merits

In support of our argument that it is unlikely that Mr. Borders will prevail on the merits, we incorporate the arguments in our July 24, 1989 motion to dismiss or summarily affirm. Particularly, in response to Mr. Borders' claim that the Department of Justice did not use a proper official in waiving the period for its advance notice of the filing of an immunity application,[3] the clear precedent in this Circuit is that the notification provision was never intended to benefit a potential witness. Rather, as this Circuit has held, the ten-day notice provision "was plainly intended to benefit solely the Department of Justice." Cammisano, 655 F.2d at 1236 (emphasis in opinion). The purpose of the notification provision is to "provide[] the Department of Justice with 'time to "lobby" for a change of mind' on the part of the congressional committee should the Attorney General object to the grant of immunity." Id. (citation omitted). The district court emphasized this point when it denied Mr. Borders' motion for a stay pending appeal: "It is unlikely that Mr. Borders will prevail on the merits of his appeal for, among other reasons, [the notification provision] is designed to protect the Attorney General's interests -- not that of the prospective witness." (Exh. 13).[4]

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[3] Mr. Borders describes the response of the district court to his argument below as follows:

> Appellant argued that 18 U.S.C. § 6005(b)(3) and (c) had not been properly waived since waiver had not been effectuated by the Attorney General. The Court agreed with the Appellant's argument and the Appellee was offered an opportunity to rectify the procedural defect by having a presidential appointee in the Justice Department waive the requirements of 18 U.S.C. § 6005(b)(3) and (c).

Appellant's Motion for Stay Pending Appeal at 3. The contention that the district court "agreed" with Mr. Borders' argument misstates the comments of the district court.

> Now, I understand all of the arguments on the merits why this is possibly an unnecessary precaution, but I would feel more comfortable if you obtain from the United States a waiver signed, if not by the Attorney General personally, at least by a presidential appointee or at least by someone who can be identified. I don't know who this is.... You get somebody to ratify or at least to verify to me who Mr. Mackey is.... Well, why don't you let them tell me on the record, in addition, that they have no opposition to the immunity.

Transcript of June 26, 1989 Hearing, at 10-12. Assistant Attorney General Crawford's letter of June 26, 1989, meets all
(footnote continued)

In his stay application in this Court, Mr. Borders bases

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of these requirements. She is a presidential appointee. Her letter identifies Mr. Mackey, the signer of the original waiver, as "Deputy Assistant Attorney General [for Legislative Affairs], who was authorized to sign in my absence." The letter reiterates that the Department of Justice has no objection to the order sought by the Committee.

[4] Because the notification provision in the immunity statute is for the sole benefit of the Department of Justice, it is important to note that the Department of Justice's interest in prosecuting Mr. Borders in connection with the alleged conspiracy to bribe Judge Hastings was satisfied by Mr. Borders' conviction in 1982. Following his conviction, the Department itself obtained a use immunity order for Mr. Borders' testimony before a grand jury that reportedly was investigating another bribery matter concerning Judge Hastings. In Re: Grand Jury Proceedings, Grand Jury 81-1 (Mia.) (William A. Borders, Jr.), Order of July 26, 1982 (S.D. Fla.).

his claim that the Department's waiver, and hence the immunity order, were defective on analogies to United States v. Giordano, 416 U.S. 505 (1974), and 18 U.S.C. § 6003. In Giordano the Supreme Court suppressed wire intercept evidence because the wiretap application had not been authorized by one of the particular Department of Justice officials -- "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General" -- prescribed in 18 U.S.C. § 2516(1) to perform that responsibility. Mr. Borders notes that another section of the immunity statute, not involved in this case, which governs the Department's initiation of its own immunity applications, restricts authorizing officials to "[a] United States attorney ... with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General or any designated Assistant Attorney General or Deputy Assistant Attorney General." 18 U.S.C.A. § 6003(b) (West 1989 P.P.). Reasoning from Giordano, Mr. Borders argues that section 6003(b) also should be construed to limit immunity application authority to the officials specified and that a similar limitation should be read into sections 6005(b)(3) and 6005(c).

Mr. Borders' attempt to read the requirement of Giordano and section 6003 into section 6005 is directly refuted by the Supreme Court's analysis in Giordano. The Court noted in Giordano that the Attorney General has general statutory authority to "'authoriz[e] the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.'" 416 U.S. at 513 (quoting 28 U.S.C. § 510). "As a general proposition," the Court stated, the Attorney General's ability to rely upon that authority to delegate, "is unexceptionable." Id. at 514. However, the Court observed, "here the matter of delegation is expressly addressed by § 2516, and the power of the Attorney General in this respect is specifically limited to delegating his authority to 'any Assistant Attorney General specially designated by the Attorney General.'" Id. Accordingly, the Court concluded, with respect to wiretap applications, the Congress overrode the Attorney General's general delegation authority by enacting a specific textual limitation of that authority.[5]

Section 6005 of title 18 includes no such limitation, but refers only to "the Attorney General." Accordingly, the Court's reasoning in Giordano provides no support for the contention that Congress intended to limit the Attorney General's ability to delegate his role under section 6005 to other Department officials, and Giordano undermines, rather than supports, Mr. Borders' argument on section 6005. Section 6003, which, like the wiretap law, specifies particular Department officials authorized to approve immunity applications, may be governed by the Giordano restriction, but section 6005, which omits any such designation, is governed by the general rule of delegability recognized as "unexceptionable" by the Court in Giordano. Contrary to Mr. Borders' argument that the limitations in section 6003 should be read into section 6005, their inclusion in section 6003, and simultaneous omission in 6005, strongly suggests that Congress intended to differentiate between the procedures in the two sections.

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[5] The Court concluded that "[t]his interpretation of the statute is also strongly supported by its purpose and legislative history." Id. at 514; see id. at 514-23.

The conclusion that Congress did not intend to specify particular Justice Department officials to perform the duties in section 6005, as it did in section 6003 and in the wiretap law, is consistent with the divergent purposes of the several provisions. The Court found in Giordano that Congress intentionally required "[t]he mature judgment of a particular, responsible Department of Justice official ... as a critical precondition to any judicial order" to intercept wire communication . 418 U.S. at 515-16. In section 6003 Congress may have similarly intended to interpose the "mature judgment" of particular officials as a precondition to the Department's application for an immunity order.

However, under section 6005, it is Congress, not the Department of Justice, that authorizes and applies for an immunity order. The "mature judgment" of particular officials is achieved in section 6005(b)(2) through the statutory precondition that two-thirds of the members of a congressional committee approve the immunity application. The role of the Attorney General under section 6005 is limited to altering the timing of the immunity order -- by waiving the ten-day notice, doing nothing and thereby maintaining the benefit of the ten-day notice provision, or requiring a twenty-day deferral beyond the original notice provision. This task of adjusting the timing of a congressional immunity application differs qualitatively from the power to decide whether to initiate immunity or wiretap applications. The execution by the Assistant Attorney General for Legislative Affairs of the task of notifying the Congress of the Department's lack of objection to immediate application for immunity orders by congressional committees is not "wholly at odds with the scheme and history of the Act." Giordano, 416 U.S. at 523. To the contrary, as the official responsible for "[m]aintaining liaison between the Department and Congress," 28 C.F.R. § 0.27 (1988), the Assistant Attorney General for Legislative Affairs is a perfectly appropriate official to communicate to the Congress the determination that no interest of the Department stands in the way of an immediate application by a committee for an immunity order.[6]

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[6] Of the dozens of immunity orders that Senate committees have obtained under 18 U.S.C. § 6005, we are aware of none (at least since the establishment of the Office of Senate Legal Counsel in 1979) for which the Attorney General personally corresponded with the Congress about the timing of the order. Rather, all such correspondence, including that relied upon by the Court in Cammisano, was signed by a subordinate Justice Department official. See Cammisano, 655 F.2d at 1234 n.3 (citing waiver "Letter from Philip B. Heymann, Assistant Attorney General, to Michael Davidson, Senate Legal Counsel (April 15, 1980)").

Furthermore, the passage of time has robbed Mr. Borders' objection of any legal significance. The Committee formally notified the Attorney General on June 8, 1989, of its intent to apply for an immunity order. Without any waiver or other response from the Department of Justice, the Committee could have applied for an immunity order as early as June 18, 1989. Hence, by the time that this Court heard the matter on June 26, 1989, more than ten days had passed since the Committee's notification to the Attorney General on June 8, 1989. Between June 8, 1989, and July 24, 1989, the return date on the subpoena to Mr. Borders at which time the immunity order was communicated to him, forty-six days had elapsed, or more than the total of thirty days by which the Department could have delayed the Committee's application for an immunity order if it had exercised all authority that it possesses under the immunity statute. Thus, the district court correctly observed in denying Mr. Borders' stay application that "the Department of Justice has now had more than ten days in which to protect its interest so that any defect in the notice or the waiver is of no material consequence to Mr. Borders." (Exh. 13).

On the question of appealability, we would only add that Kastigar v. United States, 406 U.S. 441 (1972), and Cammisano, 655 F.2d 1232, demonstrate the proper method of raising questions about immunity orders. In Kastigar, the witnesses, contending that the proposed immunity orders were not coextensive with the scope of their privilege, opposed the issuance of the immunity orders. The district court rejected their contention, ordered them to appear and to testify before the grand jury, and then held them in contempt when they refused to do so. The witnesses pursued their challenge to the adequacy of the immunity orders in an appeal from the order holding them in contempt. 406 U.S. at 442-43. Similarly, in Cammisano, the witness also raised his objections to the immunity order as a defense, albeit unsuccessful, to a subpoena enforcement proceeding. 655 F.2d at 1235.[7]

2. The Witness Will Not Be Irreparably Injured If Relief Is Denied

There is no prospect of irreparable injury to Mr. Borders by the denial of the stay application. The district court's immunity order gives him all that he is constitutionally entitled to, immunity from the use of his testimony against him. Furthermore, Mr. Borders will have an opportunity to raise his objections to the immunity order as a defense to the civil enforcement action that is now pending in the district court.

3. There is a Strong Possibility of Harm to Others and to the Public Interest if a Stay is Granted

There would, however, be substantial harm to others and to the public interest if the stay is granted. In addition to his objections to the immunity order, Mr. Borders is asserting objections grounded on the First, Fourth, Sixth, Eighth, and Fourteenth Amendments. Fragmentation of the adjudication of his objections, between this appeal and the civil enforcement proceeding that is under way in the district court, would contribute to delay in a final determination of the witness's obligation to respond to the Committee's questions. Moreover, in a matter of such extraordinary importance as the impeachment trial of a United States judge, the testimony of the person who is alleged to have conspired with that judge would be of great importance. Thus, to help to avoid harm to the impeachment process and to serve the public interest in a full exposition of the facts, denial of the stay is warranted.

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[7] Mr. Borders notes correctly that the district court, in the order denying his motion for a stay pending appeal, granted him leave to intervene nunc pro tunc.

CONCLUSION

For these reasons, the motion of William A. Borders, Jr., for a stay pending appeal of the district court's immunity order should be denied.

Respectfully submitted,

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Dated: August 8, 1989

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STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5215

IN THE MATTER OF THE APPLICATION OF
THE IMPEACHMENT TRIAL COMMITTEE ON THE
ARTICLES AGAINST JUDGE ALCEE L. HASTINGS

APPEAL OF WILLIAM A. BORDERS, JR.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION OF APPELLEE IMPEACHMENT TRIAL COMMITTEE TO DISMISS

Appellee Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings moves to dismiss the appeal of William A. Borders, Jr., from the denial by the district court of his motion for a stay pending appeal. The July 26, 1989 order of the district court and the court's memorandum are attached. Mr. Borders' appeal from the underlying June 27, 1989 immunity order of the district court is pending in this Court, on the Committee's motion to dismiss or affirm and Mr. Borders' motion for a stay pending appeal, in No. 89-5189.

Under Rule 8 of the Federal Rules of Appellate Procedure, an application for a stay of an order of a district court must ordinarily be made in the first instance in the district court. If the district court denies a stay (or if application to the district court is not practicable) then relief may be sought by motion to the court of appeals. Thus, an appeal from the denial of a stay is unnecessary. All that the aggrieved party needs to do is to file a motion for a stay in the court of appeals. As indicated above, Mr. Borders, in fact, has moved for a stay in this Court in No. 89-5189, his appeal from the June 27, 1989 immunity order. Although we have opposed that motion for a stay, it is at least the proper vehicle, rather than this separate appeal, for requesting a stay pending appeal.

Respectfully submitted,

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Dated: August 8, 1989

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5189 **September Term, 19** 89
Misc. No. 89-0129

Impeachment Trial Committee on
The Articles Against Judge Alcee L. Hastings

United States Senate

William A. Borders, Jr.,

Appellant

United States Court of Appeals
For the District of Columbia Circuit

FILED SEP 18 1989

CONSTANCE L. DUPRÉ
CLERK

89-5215

Impeachment Trial Committee on
The Articles Against Judge Alcee L. Hastings

United States Senate

William A. Borders, Jr.,

Appellant

BEFORE: Silberman, Williams and Sentelle, Circuit Judges

O R D E R

Upon consideration of appellee's motion to dismiss No. 89-5189, or in the alternative, summarily affirm and the response thereto, and appellee's motion to dismiss No. 89-5215, and appellant's motion for a stay pending appeal, and the response thereto, it is

ORDERED on the court's own motion that No. 89-5189 and No. 89-5215 be consolidated. It is

FURTHER ORDERED that appellee's motion to dismiss No. 89-5189, be granted. The immunity order issued by the

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5189 September Term, 19 89

district court on June 27, 1989, is not a final order, appealable under 28 U.S.C. § 1291. See In re Ryan, 538 F.2d 435, 436-37 (D.C. Cir. 1976)(immunity order issued under 18 U.S.C. § 6003 not a final order); see also Cobbledick v. United States, 309 U.S. 323, 328 (1940)("Whatever right [a witness] may have requires no further protection . . . than that afforded by the district court until the witness chooses to disobey and is cited for contempt.") It is

FURTHER ORDERED that appellant's motion for a stay pending appeal in No. 89-5189 be dismissed as moot. It is

FURTHER ORDERED that appellee's motion to dismiss No. 89-5215, be granted. The district court's denial of a stay pending the appeal of No. 89-5189 is now moot.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

ORIGINAL

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United States Court of Appeals
For the District of Columbia Circuit
FILED SEP 28 1989
CONSTANCE L. DUPRÉ
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THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IMPEACHMENT TRIAL COMMITTEE)
ON THE ARTICLES AGAINST)
JUDGE ALCEE L. HASTINGS)
) Cases No. 89-5189
The United States Senate)
Washington, DC 20510,) September Term, 1989
Williams A. Borders) Misc. No. 89-0129
)
Appellant)

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ORIGINAL

(M-26)

MOTION FOR RECONSIDERATION

The U.S. Court of Appeals For The District Of Columbia Circuit in an Order filed September 18, 1989, consolidated cases number 89-5189 and number 89-5215. As to the former case, the Court granted the Appellee's Motion To Dismiss, and as to the latter, the Court ruled this to be moot, having granted the former.

The Court in the above mentioned Order quoted language from Cobbledick v. United States, 309 U.S. 323, 328 (1940) stating "whatever right a [witness] may have requires no further protection . . . than that afforded by the district court until the witness chooses to disobey and is cited for contempt."

In this case William A. Borders has been cited for contempt and is presently incarcerated, and as such, the protection he is afforded is beyond that afforded by the district court.

Wherefore, it is respectfully requested that this Court reconsider the Order granting the Motion To Dismiss case number 89-5189.

Respectfully Submitted,

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MOTION\BORDERS

THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IMPEACHMENT TRIAL COMMITTEE)
ON THE ARTICLES AGAINST)
JUDGE ALCEE L. HASTINGS)
) Cases No. 89-5189
The United States Senate)
Washington, DC 20510,) September Term, 1989
Williams A. Borders) Misc. No. 89-0129
)
Appellant)

POINTS OF AUTHORITY

Cobbledick v. United States, 309 U.S. 323, 328 (1940)

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5189

September Term, 19 89

Misc. No. 89-0129

Impeachment Trial Committee on The Articles Against Judge Alcee L. Hastings

United States Court of Appeals
For the District of Columbia Circuit

FILED OCT 16 1989

CONSTANCE L. DUPRÉ
CLERK

United States Senate

William A. Borders, Jr.,

Appellant

BEFORE: Silberman, Williams and Sentelle, Circuit Judges

ORDER

Upon consideration of appellant's motion for rehearing, it is

ORDERED that the motion for rehearing be denied. Immunity orders are not immediately appealable because they are not final orders. See In re Ryan, 538 F.2d 435 (D.C. Cir. 1976). An immunity order may be reviewed through an appeal from an order of contempt. See In re Application of the United States Permanent Subcommittee on Investigation, 655 F.2d 1232, cert. denied, 454 U.S. 1084 (1981); Cobbledick v. United States, 309 U.S. 323 (1940). An appeal from the denial of an immunity order, however, does not ripen to secure appellate review upon the issuance of a contempt order. Rather, an appeal must be noted from the contempt order. Here appellant has sixty days from the entry of the contempt order within which to note an appeal. See 28 U.S.C. § 2107; Fed. R. App. P. 4(a).

Per Curiam

FILINGS IN THE FEDERAL COURTS BY THE PARTIES AND RELEVANT JUDICIAL ORDERS IN RE: SUBPOENA ENFORCEMENT PROCEEDINGS AGAINST WILLIAM A. BORDERS, JR.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST
JUDGE ALCEE L. HASTINGS,

Applicant,

v. — Misc. No. 89-129 (LFO)

WILLIAM A. BORDERS, JR.,

Respondent.

APPLICATION TO ENFORCE SUBPOENA OF SENATE IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS

1. The Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings (the "Committee") applies, pursuant to 28 U.S.C. § 1365 (Supp. V 1987), for an order of this Court requiring William A. Borders, Jr., to appear before the Committee and to testify as required by a subpoena of the Committee.

JURISDICTION

2. This Court has jurisdiction under 28 U.S.C. § 1365(a) (Supp. V 1987).

PARTIES

3. The Committee was established by Senate Resolution 38, 101st Congress, 1st Session (1989). Exhibit 1. The Committee is authorized by Senate Resolution 162, 101st Congress, 1st Session (1989), and section 705(b) of the Ethics in Government Act of 1978, 2 U.S.C. § 288d(b) (1988), to bring this action under 28 U.S.C. § 1365.

4. Respondent William A. Borders, Jr., is a witness before the Committee, who resides in Washington, D.C.

FACTS

5. Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, Exhibit 2, provides "[t]hat in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places at the committee may determine...." By the adoption of S. Res. 38 on March 16, 1989, the Senate provided for the appointment of this Committee to perform these duties and to exercise these powers in connection with the impeachment trial of Judge Alcee L. Hastings. The Articles of Impeachment against Judge Hastings are attached as Exhibit 3.

6. The Committee began taking testimony on July 10, 1989. In anticipation of the possibility that the Committee would determine to call William A. Borders, Jr., as a witness in its proceeding, Committee counsel informed the Department of Justice by letter on May 22, 1989, that the Committee might seek an order immunizing the Mr. Borders. Exhibit 4. On June 7, 1989, the Committee approved by a vote of two-thirds of its members a resolution requesting an application for an immunity order for William A. Borders, Jr. Exhibit 5. On June 8, 1989, the Senate Legal Counsel formally notified the Attorney General of the Committee's inten-

tion to request the order. Exhibits 6, 7. On June 9, 1989, the Attorney General's representative acknowledged service of the notice of intention and waived the statutory waiting periods. Exhibit 8.

7. The Committee filed its application for an immunity order in this Court on June 14, 1989. At the Court's suggestion on June 26, 1989, Exhibit 9, during a hearing at which Mr. Borders, through counsel, objected to the form of the Attorney General's waiver of the statutory waiting periods, on June 27, 1989, the Committee filed a further waiver on behalf of the Attorney General, signed by a presidential appointee, the Assistant Attorney General for Legislative Affairs. Exhibit 10. On June 27, 1989, the Court granted the immunity order. Exhibit 11.

8. On July 19, 1989, after ascertaining that neither the House nor Judge Hastings intended to call Mr. Borders as a witness, the Committee voted to issue on its own initiative a subpoena to Mr. Borders to require him to appear before it to testify on July 24, 1989. The subpoena, Exhibit 12, was served personally on Mr. Borders on July 20, 1989.

9. On July 24, Mr. Borders, appeared before the Committee, accompanied by counsel, and was sworn to testify truthfully. A certified copy of an extract from the transcript of the hearing is attached as Exhibit 13. When questioned, Mr. Borders refused to testify and answer questions, notwithstanding the Chairman's communication to him of

this Court's immunity order, and the Chairman's ordering and directing him on behalf of the Committee to answer the Committee's questions. Mr. Borders cited the Fifth, Sixth, Eighth, and Fourteenth Amendments as grounds for refusing to testify.

10. Mr. Borders was directed to return before the Committee on July 27. On July 26 this Court denied Mr. Borders' application for a stay of the immunity order pending appeal. Memorandum, Exhibit 14. When Mr. Borders returned to the Committee, he continued to refuse to answer any of the Committee's questions, although he was ordered to do so. A certified copy of an extract from the transcript of the hearing is attached as Exhibit 15. He based his refusal on the First and Fourth, as well as the previously cited, Amendments. The refusal of Mr. Borders to testify has impeded and continues to impede the Committee in its duty to take and to report to the Senate all relevant and competent evidence in the impeachment of Judge Hastings.

11. On August 3, 1989, the Senate agreed to Senate Resolution 162, 101st Congress, 1st Session, directing the Senate Legal Counsel to bring this action to enforce the Committee's subpoena and authorizing the Committee to hear and to report to the Senate Mr. Borders' testimony until the Senate's final disposition of the Articles of Impeachment against Judge Hastings and to continue this action until that time. A copy of the resolution is attached as Exhibit 16.

The Committee has published a rule, 135 Cong. Rec. S_____ (daily ed. Aug. 2, 1989)(to be printed), which will enable it to hear Mr. Borders' testimony during the recess of the Senate.

CLAIM

12. Respondent William A. Borders, Jr., has refused to answer the Committee's questions in compliance with the Committee subpoena and has persisted in his refusal, despite a valid grant of immunity and his lack of a privilege against testifying. Pursuant to 28 U.S.C. § 1365(a), this Court should issue an order directing him to answer the questions propounded by the Committee and the parties in connection with the impeachment of Judge Hastings.

PRAYER FOR RELIEF

WHEREFORE, the Committee respectfully prays:

1. That this Court issue an order directing William A. Borders, Jr., promptly to show cause, if any, why the Court should not order him to appear before the Committee and to testify concerning his knowledge of the events relevant to the impeachment of Judge Hastings.

2. That, upon return of the order to show cause, the Court issue an order requiring William A. Borders, Jr., to comply forthwith and to inform the Clerk of the Court and the Committee through counsel by an early time designated by the Court that he will appear and testify concerning his knowledge of the events relevant to the impeachment of Judge

Hastings, or, if he fails to do so, to appear in this Court at a designated time for further proceedings in this matter.

3. That the Committee have such other and further relief as may be necessary and appropriate.

Respectfully submitted,

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Judge Alcee L. Hastings

Dated: August 4, 1989

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS, Applicant, v. WILLIAM A. BORDERS, JR., Respondent.	)	Misc. No. 89-129 (LFO)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION TO ENFORCE SUBPOENA OF SENATE IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS

The Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings (the "Committee") has applied to this Court for an Order requiring William A. Borders, Jr., to testify before the Committee in compliance with a subpoena of the Committee. On July 24 and July 27, 1989, Mr. Borders appeared before the Committee and was immunized under an order of this Court, but he refused to answer the Committee's questions. See Exhibits 13, 15 to Application.

This application for judicial assistance in obtaining Mr. Borders' compliance with the Committee's subpoena is presented pursuant to 28 U.S.C. § 1365 (Supp. V 1987), which provides in relevant part:

> (a) The United States District Court for the District of Columbia shall have original jurisdiction, without regard to the amount in controversy, over any civil action brought by the Senate or any authorized committee or subcommittee of the Senate to enforce ... any subpena or order issued by the Senate or committee or subcommittee....

> **(b) Upon application by the Senate or any authorized committee or subcommittee of the Senate, the district court shall issue an order to an entity or person refusing, or failing to comply with ... a subpena or order of the Senate or committee or subcommittee of the Senate requiring such entity or person to comply forthwith. Any refusal or failure to obey a lawful order of the district court issued pursuant to this section may be held by such court to be a contempt thereof. ...**

The civil enforcement statute was enacted to remedy limitations in the prior means for enforcing Senate subpoenas. Prior to the law's enactment, the Senate "had only two means of enforcing compliance with its subpoenas: a statutory criminal contempt mechanism and the inherent congressional contempt power." In re Application of Senate Permanent Subcommittee on Investigations (Cammisano), 655 F.2d 1232, 1238 (D.C. Cir.) (footnotes omitted), cert. denied, 454 U.S. 1081 (1981). "Neither means, however, permitted a witness to challenge judicially 'the legality of the inquiry or procedures, and then to purge himself of his contempt by testifying if his contentions were not judicially upheld." Id. at 1238 (quoting United States v. Fort, 443 F.2d 670, 677 (D.C. Cir. 1970), cert. denied, 403 U.S. 932 (1971)).

"Responding to this deficiency," id. at 1238, Congress created a third mechanism by enacting section 705 of the Ethics in Government Act of 1978, 28 U.S.C. § 1365(a) (Supp. V 1987) (as renumbered). This statute created a "relatively simple" civil enforcement mechanism. Cammisano, 655 F.2d at 1238. When a witness fails to comply with a committee's subpoena, the committee files a report on the refusal with the Senate. 2

U.S.C. § 288d(c)(2) (1988). Acting on the report, the Senate may adopt a Senate resolution directing the Senate Legal Counsel to bring a civil action in this district court. 2 U.S.C. § 288b(b). In such an action, the committee "request[s] a court order requiring the individual to comply with the subpoena," Cammisano, 655 F.2d at 1238, or to face civil contempt. The enforcement proceeding is initiated through the Committee's filing of an application. 28 U.S.C. § 1365(b). Upon application, the Court issues a show cause order to the subpoenaed respondent, who thereby has notice and an opportunity to raise any matters in defense.[1]

ARGUMENT

This enforcement action presents the Court with two questions: (1) whether the Committee has authority to apply for enforcement of the subpoena, and (2) whether respondent has a privilege from testifying. Once the Committee demonstrates its authorization, enforcement of the subpoena is mandatory absent a valid claim of privilege. See 28 U.S.C. § 1365(b) ("[U]pon application by the Senate or any authorized committee ... of the Senate, the district court shall issue an order to an entity or person refusing ... to comply with ... a subpena ... requiring such an entity or person to comply forthwith." (Emphasis supplied.)

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[1] This enforcement mechanism has been used to obtain judicial civil contempt orders for congressional committees on two previous occasions. In addition to Cammisano, a Senate subcommittee obtained an order from this Court in 1984 ordering a witness to comply with its subpoena. See Senate Permanent Subcommittee on Investigations v. Accardo, Misc. No. 84-53 (D.D.C. Mar. 29 and Mar. 30, 1984) (Robinson, C.J.). On a third occasion, in 1987, a Senate committee applied for an order requiring a witness to comply with a directive to consent to disclosure of his foreign bank records. Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition v. Secord, 664 F. Supp. 562 (D.D.C. 1987). The district court upheld the witness's Fifth Amendment objection, id. at 566 (Robinson, C.J.), and the committee's appeal, No. 87-5177 (D.C. Cir.), was mooted, Order of Oct. 9, 1987, by the witness's subsequent cooperation with the committee. The Supreme Court later upheld, outside the congressional context, orders requiring witnesses to consent to disclosure of their foreign bank records. Doe v. United States, 108 S.Ct. 2341 (1988).

I

THE COMMITTEE HAS AUTHORITY TO ENFORCE ITS SUBPOENA

The Committee has authority to apply for enforcement of its subpoena to Mr. Borders. The Senate is presently engaged in the performance of the important constitutional duty "to try all Impeachments." Art. I, sec. 3, cl. 6. The Senate established this Committee to assist it in performing this duty, in the case of the impeachment of Judge Hastings, by "receiv[ing] evidence and tak[ing] testimony at such times and places as the committee may determine," Senate Impeachment Rule XI, Exhibit 2 to Application, and by reporting to the Senate "a certified copy of the transcript of the proceedings and testimony had and given before it," S. Res. 38, § 5, Exhibit 1 to Application.

Mr. Borders is a central figure in the Articles of Impeachment. Article I alleges that "[f]rom some time in the first half of 1981 and continuing through October 9, 1981, Judge Hastings and William Borders, then a Washington, D.C. attorney, engaged in a corrupt conspiracy to obtain $150,000 from defendants in United States v. Romano, a case tried before Judge Hastings, in return for the imposition of sentences which would not require incarceration of the defendants." Exhibit 3 to Application. Articles II-VI and VIII-IX also specifically refer to Mr. Borders. Id. The relevance of Mr. Borders' testimony to the Committee's proceedings is not open to question.

When the Senate established this Committee, it expressly provided that "[t]he committee shall be deemed to be a standing committee of the Senate for the purpose of reporting to the Senate resolutions for the criminal or civil enforcement of the committee's subpoenas or orders...." S. Res. 38, § 3, Exhibit 1 to Application. Pursuant to that authority, the Committee reported to the Senate a resolution directing the filing of this application for civil enforcement of its subpoena to Mr. Borders. The Senate adopted the resolution on August 3, 1989, authorizing the Committee to commence this proceeding. S. Res. 162, § 1, Exhibit 16 to Application.

The Committee voted on July 19, 1989 to issue a subpoena to Mr. Borders to require him to testify before the Committee on the Committee's own initiative, notwithstanding the decisions of both the House and Judge Hastings not to call him. The Committee concluded that, in view of the importance of its constitutional function and the centrality of Mr. Borders to the events under inquiry, it should not allow the tactical decisions of the parties to foreclose the Senate's opportunity to hear and to evaluate Mr. Borders' testimony.2/ Mr. Borders

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2/ As the Committee noted in its report to the Senate, "An Impeachment trial, no less than a trial in a court of law, 'is
(footnote continued)

was served personally with the subpoena by a United States marshal on July 20, 1989. See Exhibit 12 to Application. Mr. Borders appeared before the Committee on July 24, 1989, accompanied by counsel, and was sworn. After his counsel stated Mr. Borders' objections to testifying, Exhibit 13 to Application, Tr. at 1953-55, the Chairman ascertained from the witness that his refusal to testify was "based, at least in part, on your asserting a privilege against self-incrimination," id. at 1955, communicated to him the immunity order that had been issued by this Court on June 27, 1989, pursuant to 18 U.S.C. §§ 6002 and 6005 (1982), and directed him to answer the Committee's questions, Tr. at 1956. Stating that his counsel had appealed the immunity order and would be filing for a stay of it, Mr. Borders requested "that they be given time to do that," id. at 1959, and "respectfully refuse[d] to answer any and all questions based on the Fifth Amendment, the Sixth Amendment, the Eighth and Fourteenth Amendments." Id.

Following the Committee's deliberation on Mr. Borders' objections in closed session, the Chairman advised the witness that the Committee had determined that he had no right to refuse to answer its questions and directed him to answer

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not a game of blind man's buff; and the trial judge -- particularly in a case where he himself is the trier of the facts upon which he is to pronounce the law -- need not blindfold himself by failing to call an available vital witness simply because the parties, for reasons of trial tactics, choose to withhold his testimony.' Johnson v. United States, 333 U.S. 46, 54 (1948) (Frankfurter, J., dissenting in part)." S. Rep. No. 98, 101st Cong., 1st Sess. 10 (1989). See Fed. R. Evid. 614 ("The Court may, on its own motion ... call witnesses, and all parties are entitled to cross-examine witnesses thus called.").

them. Id. at 1979. Mr. Borders continued to refuse to answer the Committee's questions, including the following comprehensive question:

> The Chairman. Let me ask one final comprehensive question if I could at this time, Mr. Borders. The committee needs to know whether or not Judge Hastings and you planned together to solicit and accept money from a person who you thought was a defendant in a case before Judge Hastings in return for a modification of the sentence of the defendant and his brother. Among the particular facts that the Senate will need to determine are whether Judge Hastings and you arranged that he would eat at the Fountainebleau Hotel on September 16th of 1981 as a sign that he was a participant in the bribery scheme, and whether or not actions that he took in reducing a forfeiture that had been imposed on the defendants, including the timing of his final order on the forfeiture, were intended to be further signs that he was a participant in the bribery scheme. Additionally, the Senate will need to determine whether on October 5th of 1981 when you and Judge Hastings spoke by telephone and referred to "letters for Hemp," whether you were genuinely discussing help for Hemphill Pride or acting in furtherance of this bribery scheme.
>
> Mr. Borders, are you refusing to testify about each of those matters?
>
> Mr. Borders. My answer would be the same to each one, incorporating my statement and answer to each one, sir.

Id. at 1980-81. The Chairman informed Mr. Borders that he should appear again before the Committee on July 27, 1989, and "that in the interim ... you can use the time to consult with your counsel to pursue the appeal you referred to, take any other legal action you deem appropriate." Id. at 1981.

On July 25, 1989 Mr. Borders applied to this Court for a stay of the immunity order pending appeal and moved to intervene in the immunity application proceeding. The Court denied the stay application based on its view that "[i]t is unlikely that Mr. Borders will prevail on the merits of his appeal." Memorandum of July 26, 1989, Exhibit 14, at 1.[3] The Court granted Mr. Borders' motion to intervene in an order "ratif[ying]" his "de facto intervention" through his participation at the district court level. Id. at 2.

Mr. Borders returned to the Committee on July 27, 1989, as scheduled. Acknowledging that he remained under oath and that the immunity order that had been communicated to him remained in effect, he objected that "the immunity does not and cannot force me to testify in deprivation of my [rights under the] First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." Exhibit 15, Tr. at 2806. He concluded by stating, "I respectfully refuse to answer any and all questions ... and would respectfully request this committee to dismiss me and allow me to reshape and pursue my life." Id. at 2807.

After reviewing the status of Mr. Borders' challenge to the immunity order and noting that it remained unstayed and in effect, the Chairman again directed him to answer the

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[3] Mr. Borders filed a notice of appeal from the denial of the stay application the same day, No. 89-5215 (D.C. Cir.), and on July 31, 1989, moved for a stay in the court of appeals.

Committee's questions. Id. at 2810.[4] Mr. Borders stood on his statement and refused to answer all questions. Id. at 2810-11. The Chairman advised him that, while the Committee anticipated that the testimony of the parties' witnesses would be completed by August 4, 1989, the Committee's record would remain open to hear his testimony. The Senate resolution authorizing the enforcement of the subpoena to Mr. Borders effectuated the maintenance of an open record by authorizing the Committee to hear Mr. Borders' testimony and to report that testimony to the Senate at any time "[u]ntil the final disposition by the Senate of the Articles of Impeachment against Judge Alcee L. Hastings." S. Res. 162, § 2, Exhibit 16 to Application. The Committee has provided for the receipt of Mr. Borders' testimony during the Senate's recess. Committee Rule 3 ("During the recess or adjournment of the Senate one member of the Committee shall constitute a quorum for the purpose of examination of Mr. William A. Borders, Jr., at which sworn testimony is heard and evidence taken."), to be reprinted in 135 Cong. Rec. S_____ (daily ed. Aug. 2, 1989).

II

MR. BORDERS HAS NO PRIVILEGE FROM TESTIFYING

Mr. Borders raised two principal legal objections before the Committee to being called to testify: (1) that the immunity order is defective, and (2) that he already served a prison sentence following his conviction of participating in the underlying bribery conspiracy and that he was incarcerated for refusing to testify before a grand jury. Neither objection provided Mr. Borders with a valid privilege from being examined by the Committee.[5]

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[4] At the conclusion of Mr. Borders' appearance, the Chairman verified that the witness understood that both the objections that he had raised on July 24, 1989, and the additional objections which he stated on July 27, 1989, had been overruled and that the witness nonetheless refused to answer all questions. Id. at 2817-18.

A. The Immunity Order is Valid and Protects Mr. Borders' Fifth Amendment Rights

Mr. Borders has no Fifth Amendment basis for refusing to testify. The order entered by this Court on June 27, 1989, and communicated to the witness on July 24, 1989, provided "That William A. Borders, Jr., may not refuse to testify, and provide other information, at proceedings of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, on the basis of his privilege against self-incrimination." In return for his being required to testify, the Court "FURTHER ORDERED That no testimony or other information compelled under

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[5] Mr. Borders also asserted claims under the First and Fourth Amendments, although he did not explain the bases for those objections. Requiring him to testify about his knowledge of the events relevant to this impeachment does not abridge his right of free speech. See In re Grand Jury Proceedings, 643 F.2d 226, 229 (5th Cir. 1981). Nor has Mr. Borders made any showing that his examination would be the product of illegal electronic surveillance. The record reflects no illegal surveillance, and Mr. Borders alleged no illegal surveillance in the appeal of his criminal conviction. United States v. Borders, 693 F.2d 1318 (11th Cir. 1982). See In re Grand Jury Proceedings, 643 F.2d at 229 ("a general assertion of illegal electronic surveillance cannot form the basis of a justifiable refusal to testify when the government has denied the occurrence of any unlawful act").

Mr. Borders also objected to the Committee's calling him on its own initiative, but this decision provides Mr. Borders with no privilege from testifying. See note 2 supra.

this Order (or any information directly or indirectly derived from such testimony or other information) may be used against [Mr. Borders] in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this Order." Exhibit 11 to Application. This "proscription of the use in any criminal case" of testimony compelled from the witness "is consonant with Fifth Amendment standards.... [It] is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." Kastigar v. United States, 406 U.S. 441, 453 (1972).[6/]

Mr. Borders' Fifth Amendment assertion rests on his claim that the immunity order should not have been issued because of a defect in the notification given by the Department of Justice to the Committee that the Department had no interest in delaying the Committee's application. To place Mr. Borders' objection in context, we will review the statutory requirements for the issuance of an immunity order and the actions taken by the Committee, the Department of Justice, and the Court in immunizing Mr. Borders.

[6/] Concern about state prosecution, expressed in a July 25, 1989 letter from Mr. Borders' counsel to the Committee, is unfounded because the immunity afforded to Mr. Borders protects him against the use of his testimony in "any criminal case," 18 U.S.C. § 6002, whether state or federal. In re Grand Jury Proceedings, No. 84-4 (Hartmann), 757 F.2d 1580, 1582 (5th Cir. 1985) ("State courts are required to respect the immunity granted under [18 U.S.C.] §6002."); see also Murphy v. Waterfront Commission, 378 U.S. 52 (1964).

The Committee was aware that Mr. Borders had relied in part on the Fifth Amendment when he refused to testify during the House of Representatives' impeachment inquiry,[7] and that an immunity order would be necessary if the Committee was to hear his testimony. On May 22, 1989, Committee counsel advised the Department of Justice's Witness Immunity Unit, which is part of the Criminal Division, of the possibility that the Committee would apply for an immunity order for Mr. Borders' testimony. Exhibit 4 to Application. The Department was prepared, consequently, to respond quickly when, on June 8, 1989, "the Attorney General was served" by the Senate Legal Counsel "with notice of [the Committee's] intention to request the order." 18 U.S.C. § 6005(b)(3). Exhibits 6, 7 to Application. The notification to the Attorney General followed the Committee's vote on June 7, 1989, pursuant to 2 U.S.C. §§ 288b(d) and 288f (1988), to direct the Senate Legal Counsel to apply for a court order immunizing from use in prosecutions Mr. Borders' testimony at proceedings of the Committee. The resolution, Exhibit 5 to Application, was approved by nine of the twelve members of the Committee in accordance with the requirement that a request for an immunity order be approved by an affirmative vote of two-thirds of the committee. 18 U.S.C. § 6005(b)(2).

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[7] Impeachment Inquiry: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 100th Cong., 2d Sess. 225 (1988).

On June 9, 1989, the Department sent to the Senate Legal Counsel a waiver of its right to a limited delay in the filing of the Committee's immunity application, stating that it "has no objection to the proposed order to compel the testimony of William A. Borders, Jr. and hereby waives the provisions of 18 U.S.C. Section 6005(b)(3) and (c)." Exhibit 8 to Application. Section 6005(b)(3) provides that the Attorney General should have ten days' notice prior to the filing by a congressional committee of an immunity application. As will be described below, the Department of Justice's power to waive the notice requirement was upheld by this Circuit in Cammisano, 655 F.2d at 1236-38. Section 6005(c) authorizes the Attorney General to obtain an additional twenty day deferral of the issuance of an order after a committee applies for it. The Department's letter was signed by John Mackey for Carol Crawford, the Assistant Attorney General for Legislative Affairs. Mr. Mackey is a Deputy Assistant Attorney General for Legislative Affairs, but the letter did not state his title.

On the basis of the Department's waiver, the Committee applied to this Court on June 14, 1989 -- rather than waiting until June 18, 1989, when it could have proceeded without a waiver -- for an immunity order for Mr. Borders' testimony.8/

8/ The Committee had been permitting the parties to conduct a limited number of pretrial examinations in June; the slight expedition of the application for the immunity order enabled the Committee to be prepared if the parties sought, or the Committee independently determined to conduct, a pretrial examination of Mr. Borders. As it turned out, Mr. Borders was not summoned to a pretrial examination.

The Court set the application down for a hearing on June 26, 1989, at which Mr. Borders appeared and opposed the issuance of the immunity order. He claimed, even though by then more than ten days had passed since the Attorney General had been notified, that a proper official had not waived the Department's right to ten days' notice prior to the filing of the immunity application. In response to Mr. Borders' objection, the Court suggested that the Committee file a waiver signed by a presidential appointee, which the Committee did on June 27, 1989, when it filed a letter signed by Assistant Attorney General Crawford, which provided Mr. Mackey's title, stated that he had been authorized to sign the correspondence in the Assistant Attorney General's absence, and reiterated the Department's waiver. Exhibit 10 to Application. Upon the filing of that letter, the Court "determin[ed] that the procedural requirements set forth in 18 U.S.C. § 6005 have been satisfied," and issued the immunity order. Exhibit 11 to Application.

The claim that Mr. Borders is asserting, that the Department of Justice did not use a proper official in waiving the period for its advance notice of the filing of an immunity application, involves a provision that was never intended to benefit a potential witness. Rather, as this Circuit has held, the ten day notice provision "was plainly intended to benefit solely the Department of Justice." Cammisano, 655 F.2d at 1236 (emphasis in opinion). The purpose of the notification provision is to "provide[] the Department of Justice with 'time to "lobby" for a change of mind' on the part of the congressional committee should the Attorney General object to the grant of immunity." Id. (citation omitted). This Court emphasized this point when it denied Mr. Borders' motion for a stay pending appeal: "It is unlikely that Mr. Borders will prevail on the merits of his appeal for, among other reasons, [the notification provision] is designed to protect the Attorney General's interests -- not that of the prospective witness." Memorandum of July 26, 1989, Exhibit 14 to Application, at 1-2.[9]

In his stay application in this Court, Mr. Borders based his claim that the Department's waiver, and hence the immunity order, were defective on analogies to United States v. Giordano, 416 U.S. 505 (1974), and 18 U.S.C. § 6003. In Giordano the Supreme Court suppressed wire intercept evidence because the wiretap application had not been authorized by one of the particular Department of Justice officials -- "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General" -- prescribed in 18 U.S.C. § 2516(1) to perform that responsibility. Mr. Borders noted that another section of the immunity statute, not involved in this case, which governs the Department's initiation of its own immunity applications, restricts authorizing officials to "[a] United States attorney ... with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General or any designated Assistant Attorney General or Deputy Assistant Attorney General." 18 U.S.C.A. § 6003(b) (West 1989 P.P.). Reasoning from Giordano, Mr. Borders argued that section 6003(b) also should be construed to limit immunity application authority to the officials specified and that, since section 6003(b) and section 6005(c) were originally enacted in the same statute, a similar limitation should be read into section 6005(c).

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[9] Because the notification provision in the immunity statute is for the sole benefit of the Department of Justice, it is important to note that the Department of Justice's interest in prosecuting Mr. Borders in connection with the alleged conspiracy to bribe Judge Hastings was satisfied by Mr. Borders' conviction in 1982. Following his conviction, the Department itself obtained a use immunity order for Mr. Borders' testimony before a grand jury that reportedly was investigating another bribery matter concerning Judge Hastings. In Re: Grand Jury Proceedings, Grand Jury 81-1 (Mia.) (William A. Borders, Jr.), Order of July 26, 1982 (S.D. Fla.).

Mr. Borders' attempt to read the requirement of Giordano and section 6003 into section 6005 is directly refuted by the Supreme Court's analysis in Giordano. The Court noted in Giordano that the Attorney General has general statutory authority to "'authoriz[e] the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.'" 416 U.S. at 513 (quoting 28 U.S.C. § 510). "As a general proposition," the Court stated, the Attorney General's ability to rely upon that authority to delegate, "is unexceptionable." Id. at 514. However, the Court observed, "here the matter of delegation is expressly addressed by § 2516, and the power of the Attorney General in this respect is specifically limited to delegating his authority to 'any Assistant Attorney General specially designated by the Attorney General.'" Id. Accordingly, the Court concluded, with respect to wiretap applications, the

Congress overrode the Attorney General's general delegation authority by enacting a specific textual limitation of that authority.[10]

Section 6005 of title 18 includes no such limitation, but refers only to "the Attorney General." Accordingly, the Court's reasoning in Giordano provides no support for the contention that Congress intended to limit the Attorney General's ability to delegate his role under section 6005 to other Department officials, and Giordano undermines, rather than supports, Mr. Borders' argument on section 6005. Section 6003, which, like the wiretap law, specifies particular Department officials authorized to approve immunity applications, may be governed by the Giordano restriction, but section 6005, which omits any such designation, is governed by the general rule of delegability recognized as "unexceptionable" by the Court in Giordano. Contrary to Mr. Borders' argument that the limitations in section 6003 should be read into section 6005, their inclusion in section 6003, and simultaneous omission in 6005, strongly suggests that Congress intended to differentiate between the procedures in the two sections.

The conclusion that Congress did not intend to specify particular Justice Department officials to perform the duties in section 6005, as it did in section 6003 and in the wiretap law, is consistent with the divergent purposes of the several provisions. The Court found in Giordano that Congress intentionally required "[t]he mature judgment of a particular, responsible Department of Justice official ... as a critical precondition to any judicial order" to intercept wire communications. 418 U.S. at 515-16. In section 6003 Congress may have similarly intended to interpose the "mature judgment" of particular officials as a precondition to the Department's application for an immunity order.

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[10] The Court concluded that "[t]his interpretation of the statute is also strongly supported by its purpose and legislative history." Id. at 514; see id. at 514-23.

However, under section 6005, it is Congress, not the Department of Justice, that authorizes and applies for an immunity order. The "mature judgment" of particular officials is achieved in section 6005(b)(2) through the statutory precondition that two-thirds of the members of a congressional committee approve the immunity application. The role of the Attorney General under section 6005 is limited to affecting the timing of the committee's application -- by waiving the ten days' notice, doing nothing, or requiring a twenty-day deferral. This task of adjusting the timing of a congressional immunity application differs qualitatively from the power to decide whether to initiate immunity or wiretap applications. The execution by the Assistant Attorney General for Legislative Affairs of the task of notifying the Congress of the Department's lack of objection to immediate application for immunity orders by congressional committees is not "wholly at odds with the scheme and history of the Act." Giordano, 416 U.S. at 523. To the contrary, as the official responsible for "[m]aintaining liaison between the Department and Congress," 28 C.F.R.

§ 0.27 (1988), the Assistant Attorney General for Legislative Affairs is a perfectly appropriate official to communicate to the Congress the determination that no interest of the Department stands in the way of an immediate application by a committee for an immunity order.[11]

Furthermore, the passage of time has robbed Mr. Borders' objection of any legal significance. The Committee formally notified the Attorney General on June 8, 1989 of its intent to apply for an immunity order. Without any waiver or other response from the Department of Justice, the committee could have applied for an immunity order as early as June 18, 1989. Hence, by the time that this Court heard the matter on June 26, 1989, more than ten days had passed since the Committee's notification to the Attorney General on June 8, 1989. Between June 8, 1989 and July 24, 1989, the return date on the subpoena to Mr. Borders, forty-six days had elapsed, or more than the total of thirty days by which the Department could have delayed the Committee's application for an immunity order if it had exercised all authority that it possesses under the immunity statute. Thus, the Court correctly observed in denying Mr. Borders' stay application that "the Department of Justice has now had more than ten days in which to protect its interest so that any defect in the notice or the waiver is of no material consequence to Mr. Borders." Memorandum of July 26, 1989, Exhibit 14 to Application, at 2.

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[11] Of the dozens of immunity orders that congressional committees have obtained under 18 U.S.C. § 6005, we are aware of none for which the Attorney General personally corresponded with the Congress about the timing of the order. Rather, all such correspondence, including that relied upon by the Court in Cammisano, was signed by a subordinate Justice Department official. See Cammisano, 655 F.2d at 1234 n.3 (citing waiver "Letter from Philip B. Heymann, Assistant Attorney General, to Michael Davidson, Senate Legal Counsel (April 15, 1980)").

As he noted in his first appearance before the Committee on July 24, 1989, Mr. Borders filed a notice of appeal on July 6, 1989 from the grant of the immunity order. In re Application of Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, No. 89-5189 (D.C. Cir.). However, Mr. Borders took no immediate action to stay the effectiveness of the order. In his July 24 appearance, Mr. Borders asked the Committee for time to enable his counsel to apply for a stay. Following that appearance, the Committee filed a motion in the court of appeals to dismiss Mr. Borders' appeal, or, in the alternative, for summary affirmance, and moved to expedite the consideration of that motion. Mr. Borders' counsel moved to delay the consideration of the motion by extending the time to respond to it. The court of appeals denied both the motion to expedite and the motion to delay. Order of July 26, 1989. In explaining why the Committee would not suffer irreparable injury by the denial of expedition, the court of appeals "note[d] that if [Mr. Borders] refuses to comply with [the] district court's order filed June 27, 1989, [the Committee] may seek enforcement through civil contempt proceedings." Id. The motion to dismiss the appeal or for summary affirmance has been fully briefed and is now pending in the court of appeals.

The filing of an appeal does not vitiate the effectiveness of an immunity order. One reason that the Congress has placed limits on the period during which the Department of Justice may delay the issuance of an immunity order for congressional testimony is to assure that the Congress's access to necessary information is not unduly delayed. It would defeat this central purpose of the immunity statute then to make the process of immunization subject to the uncertainties of appellate calendars. The Committee exercised its discretion in providing Mr. Borders with time to seek a stay, but when he was unable to obtain one the Committee determined that it should proceed to enforce its subpoena, as the court of appeals has stated unambiguously that the Committee may do. Prompt enforcement is particularly urgent in this case because the Committee needs to hear Mr. Borders' testimony and report it to the Senate before the Senate acts upon the pending Articles of Impeachment against Judge Hastings later this session.

B. Mr. Borders Has No Privilege as a Result of His Previous Criminal Conviction and Civil Contempt For Refusing To Testify Before a Grand Jury

The second objection to the subpoena that Mr. Borders articulated to the Committee is that he served a term of imprisonment and paid a fine imposed on him following his criminal conviction in 1982 for conspiring to bribe Judge Hastings,[12] and "[a]bove and beyond that, with regard to the same subject matter which is here under consideration today," Exhibit 13 to Application, Tr. at 1954, he was incarcerated for civil contempt in 1982 for refusing to testify before a grand jury in the Southern District of Florida.[13/] He asserted that requiring him to testify would be a denial of due process, violate the constitutional prohibition against double jeopardy, and constitute cruel and unusual punishment. More generally, Mr. Borders stated to the Committee that "I believe my legal debt to society has been paid in full." Exhibit 15 to Application, Tr. at 2805.

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[12] Exhibit 15 to Application, Tr. at 2803. Mr. Borders entered the Allenwood Federal Prison Camp on May 25, 1983, where he was imprisoned until December 10, 1985, when he entered a halfway house, Hope Village. He was released from

Mr. Borders' criminal sentence poses no legal impediment to the Committee's subpoena. Immunity statutes have been enacted for the very reason "that many offenses are of such a character that the only persons capable of giving useful testi-

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Hope Village on February 24, 1986, and was on parole until May 27, 1988. Id. at 2802-03. Of his five-year sentence, he was incarcerated for about thirty-three months (including the time in the halfway house) and was on parole for about twenty-seven months.

[13/] Exhibit 15 to Application, Tr. at 2804. Mr. Borders was subpoenaed to appear before a grand jury in the Southern District of Florida on June 8, 1982, a month after he had been sentenced in his criminal case, but refused, even after an immunity order was obtained for him that day, to testify. In papers filed in response to the Government's contempt motion, Mr. Borders referred to newspaper articles that he had been summoned to testify about the solicitation of a bribe in another criminal case before Judge Hastings. On July 26, 1982, the district court entered an "Order and Judgment of Civil Contempt" under 28 U.S.C. § 1826, and "committed [Mr. Borders] to the custody of the United States Marshal to be confined at a suitable place until such time as he is willing to comply with this Court's order of June 8, 1982, or for the remaining life of the term of Grand Jury 81-1 (MIA.), or for eighteen (18) months, whichever first occurs." In re: Grand Jury Proceedings, Grand Jury 81-1 (Mia.) (William A. Borders, Jr.), Order of July 26, 1982 (S.D. Fla.). Mr. Borders remained in custody under this civil contempt order for about forty days.

mony are those implicated in the crime." Kastigar v. United States, 406 U.S. at 446.[14] Conviction and imprisonment does not excuse a participant from providing testimony about the culpability of others, for "[i]f two persons witness an offense -- one being an innocent bystander and the other an accomplice who is thereafter imprisoned for his participation -- the latter has no more right to keep silent than the former." Piemonte v. United States, 367 U.S. 556, 559 n.2 (1961).

Nor does Mr. Borders' incarceration for forty days in 1982 for civil contempt for failing to testify before a grand jury excuse him from testifying in this impeachment proceeding. His incarceration in 1982 until "such time as he is willing to comply" with the order that he testify, see note 13 supra, was an exercise of "the power of courts to impose conditional imprisonment for the purpose of compelling a person to obey a valid order. Such coercion, where the defendant carries the keys to freedom in his willingness to comply with the court's directive, is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees." Green v. United States, 356 U.S. 165, 197 (1958) (Black, J., dissenting). Even for the same act of contumacy, "civil and criminal sentences serve[] distinct purposes, the one coercive, the other punitive and deterrent." Yates v. United States, 355 U.S. 66, 74 (1957). Consequently, "that the same act may give rise to these distinct sanctions presents no double jeopardy problem." Id. [15]

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[14] Indeed, as the Court noted in Kastigar, a "notable instance of the early use of immunity legislation is the 1725 impeachment trial of Lord Chancellor Macclesfield. The Lord Chancellor was accused by the House of Commons of the sale of public offices and appointments. In order to compel the testimony of Masters in Chancery who had allegedly purchased their offices from the Lord Chancellor, and who could incriminate themselves by so testifying, Parliament enacted a statute granting immunity to persons then holding office as Masters in Chancery." Id. at 445 n.13.

Mr. Borders' objection to the Committee's subpoena fails for two other, even more fundamental, reasons. The first is that the Committee is not presently seeking to punish him. The Committee's subpoena seeks his testimony, not his punishment. At this stage, the Senate has authorized only a civil enforcement action and the Committee is seeking, first, an order requiring Mr. Borders to comply with its subpoena. Only if Mr. Borders refuses to comply with such an order will he face the prospect of civil sanctions to coerce obedience. No punishment is at issue here.[16]

Moreover, Mr. Borders' obligation in 1982 to testify before the grand jury and his obligation in 1989 to testify before a committee of the Senate in the pending impeachment trial are totally separate from each other. Judge Hastings must defend himself against the articles exhibited by the House because double jeopardy is not a bar to his trial on impeachment charges, as this Court recently denied. Hastings v. United States Senate, No. 89-1602, slip op. at 7-9 (D.D.C. July 5, 1989) (per Gesell, J.). Many witnesses have been required to testify even though they have testified before the grand jury, at Judge Hastings' or Mr. Borders' criminal trials or both, and before an investigating body in the Judicial Branch. This has been necessary because impeachment serves a distinct constitutional function that is not estopped by prior proceedings in the executive and judicial branches. Whether Mr. Borders testified or not in prior proceedings in other branches, or resisted or yielded to coercion in those proceedings, the Senate has a separate entitlement to his testimony in carrying out its "sole Power to try all Impeachments" under Article I, section 3, clause 6 of the Constitution. Accordingly, Mr. Borders' earlier contumacious conduct, and the civil sanctions imposed upon him, have no legal bearing on his current disobedience of the Committee's subpoena.

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[15] The Eighth Amendment's prohibition against cruel and unusual punishment is inapplicable to a judgment of civil contempt that results only in incarceration pending compliance. Ingraham v. Wright, 430 U.S. 651, 688 (1977); United States v. Dien, 598 F.2d 743, 745 (2d Cir. 1979).

[16] The Committee determined to initiate only a civil enforcement action at this time, because its "objective is to obtain Mr. Borders' immediate testimony." S. Rep. No. 101-98. Therefore, no punitive consequences are implicated in this proceeding. If the imposition of civil coercive sanctions fails to secure obedience to the Committee's subpoena, the Senate may then, following its disposition of the Articles of Impeachment, refer Mr. Borders' contempt to the United States Attorney for prosecution for criminal contempt under 2 U.S.C. §§ 192-194 (1988).

REQUEST FOR EXPEDITION

The Committee respectfully requests expedited treatment of the Committee's application for enforcement of its subpoena. As of August 3 the Committee has finished the four-week process of taking the testimony of all other witnesses from whom it will hear. The Committee is currently engaged in the task of certifying its evidentiary record to the Senate and of providing the Senate with a summary of the contested and uncontested factual issues in the proceeding. Although the Committee will not delay in reporting to the Senate the evidentiary record of the last four weeks,[17/] the Senate has authorized the Committee to keep its record open to receive testimony from Mr. Borders.

If Mr. Borders' testimony is to be of use to the Senate in its performance of this important constitutional function, it must come soon, before the Senate moves to final disposition of the Articles of Impeachment. It is apparent from Mr. Borders' appearances before the Committee that he will not testify without the enforcement of the Committee's subpoena by this Court. Accordingly, the Committee respectfully requests that the Court promptly issue an order requiring Mr. Borders to show cause why he should not be ordered to comply with the Committee's subpoena. We suggest that, in view of the urgency and importance of this matter, the show cause order be returnable no later than August 9, 1989. See H.R. Rep. No. 985, 98th Cong., 2d Sess. 11 (1984) ("It is virtually certain that all of

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[17/] At the conclusion of the hearings on August 3, the Chairman advised the parties that the printed evidentiary record will be submitted to the Senate shortly after the Senate returns from its August recess and that the Committee's report will be submitted to the Senate by the middle of September. The post-trial briefs of the parties will be filed by the end of September. The Chairman advised the parties that it is expected that the impeachment will be taken up on the floor of the Senate during the first three weeks of October, at which time the parties will make summations to the full Senate before the Senate retires to deliberate on the articles.

these [Senate civil enforcement] cases will qualify for expedited treatment under the 'good cause shown' standard set forth in proposed section 1657 of Title 28."), reprinted in 1984 U.S. Code Cong. & Adm. News 5779, 5789; cf. In re Grand Jury Proceedings, 643 F.2d at 229 (where same counsel represented witness, interval of one hour bef~~ore conte~~mpt hearing adequate); In re Grand Jury Proceedings, 559 F.2d 234, 237 (5th Cir. 1977) (per curiam) (same).18/

Upon return of the order to show cause, the Committee respectfully requests that the Court promptly issue an order requiring Mr. Borders to comply with the Committee's subpoena "forthwith," 28 U.S.C. § 1365(b), and requiring Mr. Borders to inform the Clerk of this Court and the Committee through counsel at an early prescribed time that he will appear and testify before the Committee, so that the Committee may promptly arrange to receive his testimony, and, if he fails to do so, requiring him to appear in this Court at a designated time for further proceedings to compel his compliance with the Committee's subpoena.

If such a hearing is necessary, the Committee will then and there seek the immediate imposition of civil sanctions, which could involve incarceration and a daily fine, to compel Mr. Borders to obey the Court's order to comply with the

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18/ By virtue of the Court's grant of his motion to intervene, Mr. Borders is already a party to this miscellaneous action. We served his local counsel by hand with our application and this supporting memorandum. As in Cammisano, this application is a continuation of the prior immunity proceeding.

Committee's subpoena. We appreciate the burden that such an expedited procedure may impose on the Court, but we believe that the interests of justice and fairness in the performance of the Senate's important constitutional function warrant great effort to attempt to secure the timely testimony of this central witness.

CONCLUSION

The Court should order Mr. Borders to show cause why he should not be ordered to comply with the Committee's subpoena and, if he fails to comply, be held in civil contempt.

Respectfully submitted,
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Deputy Senate Legal Counsel

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Counsel for Senate Impeachment
Trial Committee on the Articles
Against Judge Alcee L. Hastings

Dated: August 4, 1989

AUG 4 1989

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS,
Applicant,

v.

WILLIAM A. BORDERS, JR.,
Respondent.

Misc. No. 89-129-LFO

ORDER

Upon consideration of the application to enforce subpoena of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, the memorandum of points and authorities and exhibits filed in support thereof, and the availability of respondent's counsel, it is this 4th day of August, 1989, hereby

ORDERED: that William A. Borders, Jr., shall file a response to that application no later than August 14, 1989, to show cause, if any there be, why the Court should not order him to appear before the Committee forthwith and to answer the questions to be propounded to him by the Committee and the parties relating to the impeachment of Judge Alcee L. Hastings; and it is further

ORDERED: that the Committee shall respond in writing to any response filed by William A. Borders no later than August 16, 1989; and it is further

United States District Court
for the District of Columbia
A TRUE COPY

JAMES F. DAVEY, CLERK,
By
Deputy Clerk

ORDERED: that the applicant and the respondent shall appear before Judge Revercomb on this matter on August 17, 1989, at 10:15 a.m. in Courtroom No. 11.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

RECEIVED AUG 1 4 1989

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE)
ON THE ARTICLES AGAINST)
JUDGE ALCEE L. HASTINGS,)
Applicant,) Misc. No. 89-129-LFO
)
v.)
)
WILLIAM A. BORDERS, JR.,)
Respondent.)

OPPOSITION OF RESPONDENT, WILLIAM A BORDERS, JR., TO APPLICATION TO ENFORCE SUBPOENA OF SENATE IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS

Now comes, Respondent, William A. Borders, Jr., by and through counsel opposing the Application to Enforce Subpoena of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings. The grounds in support of this Opposition are more particularly set forth in the attached Memorandum of Points and Authorities. The Respondent files this response pursuant to the Order of August 4, 1989 issued by the Honorable Louis F. Oberdorfer, District Court Judge.

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Attorneys for Appellant

August 14, 1989

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE)
ON THE ARTICLES AGAINST)
JUDGE ALCEE L. HASTINGS,)
Applicant,) Misc. No. 89-129-LFO
)
v.)
)
WILLIAM A. BORDERS, JR.,)
Respondent.)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RESPONDENT'S OPPOSITION TO APPLICATION TO ENFORCE SUBPOENA OF SENATE IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS.

I. INTRODUCTION.

On June 7, 1989, the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings (hereinafter "the Trial Committee") adopted a resolution instructing the Senate Legal Counsel to apply for an order, pursuant to 18 U.S.C. § 6002 and § 6005, granting use immunity to William A. Borders, Jr., a potential witness at the Hastings impeachment trial. See Exh. A.

In accordance with 18 U.S.C. § 6005, the Trial Committee notified the Attorney General of its intention to request a use immunity order from the Federal District Court for the District of Columbia. This written notification to the Department of Justice is dated June 8, 1989. See Exh. B.

On June 9, 1989, the Senate Legal Counsel received a letter from the Department of Justice which purported to waive the provisions of 18 U.S.C. § 6005(b)(3) and (c). In the signature position was the name "Carol T. Crawford, Assistant Attorney General." The name was in typeface. The letter was signed by "John Mackey." See Exh.

On June 14, 1989, the Trial Committee filed an application for an order granting use immunity to Mr. Borders if he were called as a witness in the Hastings impeachment trial. On June 19, 1989, the District Court issued an order requiring the parties to appear at a hearing on the matter.

The parties appeared before the Honorable Louis F. Oberdorfer, United States District Court Judge, on June 26, 1989, for a hearing. At the hearing, both the Respondent and the Applicant were present and represented by counsel. No representative of the Justice Department appeared. The Respondent objected to the Trial Committee's request for a grant of use immunity on the procedural grounds that the application failed to comport with the requirements set forth in 18 U.S.C. § 6005. Respondent argued that 18 U.S.C. § 6005(b)(3) and (c) had not been properly waived since waiver had not been effectuated by the Attorney General. The Court agreed with the Respondent's argument and the Trial Committee was offered an opportunity to rectify the procedural defect by having a presidential appointee in the Justice Department waive the requirements of 18 U.S.C. § 6005(b)(3) and (c).

The hearing was adjourned. On June 27, 1989, the Trial Committee filed documents with the District Court containing a second letter from the Justice Department signed by Carol T. Crawford, Assistant Attorney General. Again, the letter purports to exercise the Attorney General's sole prerogative of waiving 18 U.S.C. § 6005(b)(3) and (c). See Exh. D. By Order of June 27, 1989, Judge Louis F. Oberdorfer granted the Trial Committee's request giving use immunity to William A. Borders, a potential witness in the Hastings trial. The Order specifically states that the procedural requirements set forth in 18 U.S.C. § 6005 have been satisfied. See Exh. E. On July 6, 1989, William A. Borders, Jr. timely filed a Notice of Appeal in the United States Court of Appeals for the District of Columbia. On July 24, 1989, Mr. Borders appeared before the Trial Committee pursuant to its subpoena of July 19, 1989. Mr. Borders, because of his pending appeal and cruel and unusual punishment refused to testify before the Trial Committee.

On July 24, 1989, the Trial Committee filed a Motion to Dismiss the Appeal or to Summarily Affirm the trial courts Order of June 27, 1989 in the United States Court of Appeals for the District of Columbia. The Trial Committee also filed a Motion to Expedite Consideration of its Motion to Dismiss the Appeal or to Summarily Affirm the trial courts Order of June 27, 1989. On July 25, Mr. Borders filed a Motion to Stay Judge Oberdorfer's Order of June 27, 1989 along with a Motion to Intervene in the District Court. Mr. Borders also filed in the United States Court of Appeals a Motion in Opposition to the Trial Committee's Motion to Expedite Consideration of its Motion to Dismiss or for Summary Affirmance.

On July 26, 1989, the District Court Judge Louis F. Oberdorfer, denied Mr. Border's Motion to Stay Pending Appeal, but allowed his Motion to Intervene. A Memorandum Opinion was issued on July 26, 1989. See Exh. F. The United States Court of Appeals denied the Impeachment Trial Committee's Motion to Expedite Consideration on that same day. See Exh. G. Mr. Borders appeared again before the Trial Committee on July 27, 1989, and again refused to testify since an appeal of the trial court's denial of his Motion to Stay was being prepared by counsel.

On July 31, 1989, Respondent filed a Motion to Stay the District Court's Order of June 27, 1989 and an Opposition to the Trial Committee's Motion to Dismiss or to Summarily Affirm the Appeal of Respondent in the United States Court of Appeals. Neither Respondent's Motion to Stay Pending Appeal nor the Trial Committee's Motion to Dismiss or for Summary Affirmance has been decided by the United States Court of Appeals. On August 4, 1989, the

Trial Committee filed the Application to Enforce Subpoena in this Court.

On August 4, 1989, this Court ordered the Respondent, William A. Borders, Jr., to respond to the Application to Enforce Subpoena and a hearing on the matter was scheduled for August 17, 1989, before the Honorable Judge Revercomb. The Respondent makes this response pursuant to the Court's Order of August 4, 1989.

II. ARGUMENT

A. CONTRARY TO THE APPLICANT'S ASSERTION, THE DISTRICT COURT'S GRANT OF USE IMMUNITY PURSUANT TO TITLE 18 U.S.C. § 6005 IS CLEARLY ERRONEOUS.

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(1) The Trial Committee's Request for Use Immunity Fails to Comply With the Procedural Requirements of 18 U.S.C. § 6005.

Title 18 of the United States Code, § 6005 provides, inter alia:

> § 6005. Congressional proceedings
>
> (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States District Court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or to provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become

> effective as provided in section 6002 of this part.
>
> (b) Before issuing an order under subsection (a) of this section, a United States District Court shall find that -
>
>> (2) in the case of a proceeding before a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee, and
>>
>> (3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order[.]
>
> (c) Upon application by the Attorney General, the United States District Court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

The preceding statutory provisions govern grants of use immunity in cases where an individual may be called as a witness before a committee or subcommittee of the House or Senate or a joint committee of both Houses of Congress. The Trial Committee is a committee of the Senate and therefore comes within the purview of § 6005. It is settled law that a request for use immunity (18 U.S.C. § 6002 - § 6005) by a committee of a house of

Congress is a constitutionally valid exercise of a statutory right. See In re Sealed Case, 791 F.2d 179; 180-181 (D.C. Cir.); cert. denied, 479 U.S. 924 (1986); see also In re Sealed Case, 776 F.2d 335 (D.C. Cir. 1985); see generally P.A. Robinson, Criminal Law Defenses, 205 (vol. 2) at 482-488 (1984).

It is equally clear that a request for use immunity must strictly comply with the requirements of 18 U.S.C. § 6005. The District Court "is to be a checkpoint" for ensuring that the procedural requirements of the provision have been met prior to the issuance of an order granting use immunity. Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270, 1278 (1973). The Court must "scrutinize the record to make certain that the congressional request for an immunity order is jurisdictionally and procedurally well-founded, and that the Attorney General has been notified." Id.

There are two procedural requirements under § 6005(b) which are applicable to the case sub judice: (a) the request for immunity must be approved by two-thirds of the full Committee (§ 6005(b)(2)); and (b) at least ten days prior to filing of the immunity request, the Committee must provide the Attorney General with notice of its intention to seek immunity for the witness (§ 6005(b)(3)). We submit that the Committee failed to comply with the 10-day notice requirement set out in § 6005(b)(3). Thus, the application for the use immunity request is procedurally defective and should have been denied by the District Court.

On June 8, 1989, the Trial Committee properly notified, Richard Thornburgh, the Attorney General of the United States, of its intention to request an immunity order. See Exh. B. On June 9, 1989, a letter purporting to waive 18 U.S.C. § 6005(b)(3) and (c) was sent to Michael Davidson, Senate Legal Counsel. This letter was not signed by the Attorney General personally. It was signed by John Mackey for Carol T. Crawford, Assistant Attorney General. After the hearing on June 26, 1989, the Trial Committee submitted to the Court yet another letter purporting to waive 18 U.S.C. § 6005(b)(3) and (c). The letter was signed by "Carol T. Crawford, Assistant Attorney General." This letter was not personally signed by the Attorney General.

On its face, § 6005(b)(3) does not specifically provide for a waiver of the 10-day notice provision. However, the decisional law of this circuit has interpreted § 6005(b)(3) to be directory and not mandatory. The Attorney General, in his discretion, may waive the provision since the provision inures only to the benefit of the Department of Justice. In re Application of the United States Permanent Subcommittee on Investigations

(Cammisano), 655 F.2d 1232, 1235-1236 (D.C. Cir.), cert. denied, 454 U.S. 1084 (1981); See Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270 (D.D.C. 1973); see also Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1282 (D.D.C. 1973).

There is no discussion in the case law indicating the circumstances which would justify a designee of the Attorney General acting in his stead. In Application of the United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1282 (D.D.C. 1973), the Attorney General, represented by the Watergate Prosecutor, Archibald Cox, waived the 10-day notice requirement of § 6005(b)(3) and the 20-day deferred period (§ 6005(c)). However, no one objected to or challenged the waiver.

We contend that the statute does not allow a designee of the Attorney General to act in his stead. Our construction of 18 U.S.C. § 6005(b)(3) and (c) is elucidated and supported by reading 18 U.S.C. § 6005 in pari materia with a related statute, 18 U.S.C. § 6003 which provides in toto:

> § 6003. Court and grand jury proceedings
>
> (a) In the case of an individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States District

> Court for the judicial district in which the proceedings is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in § 6002 of this part.
>
> (b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) to this section when in his judgment -
>
> > (1) the testimony or other information from such individual may be necessary to the public interest; and
> >
> > (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

It must be noted that § 6003(b) specifically provides that the approval of a request for an immunity order from a court must first have the approval of "the Attorney General, the Deputy Attorney General or any designated Attorney General." The United States Attorney requesting the order must, as required by subsection (b), seek such approval prior to filing the application in court under subsection (a). Both § 6003 and § 6005 are related statutes which regulate the grant of use immunity before judicial or quasi-judicial bodies. In § 6003 it is clear that Congress did not intend the Attorney General himself to be the sole repository of power when it comes to approving or disapproving a United States attorney's initial request, prior to filing the request with a court, for a use immunity order under § 6003(a). The power can be exercised by a Deputy Attorney General or a designated Assistant Attorney General. A designee is therefore allowed and sanctioned by the statute. Though § 6003 and § 6005 concern different proceedings, the proper construction of § 6005 when read in pari materia with § 6003 must force the court to the ineluctable conclusion that Congress did not intend anyone except the Attorney General to exercise the authority set forth in § 6005.

Thus, the canon of statutory interpretation, expressio unius est exclusio alterius should be applied. It holds that the expression of the one thing means the exclusion of another thing. There is an inference that all omissions from a statute are understood as exclusions. See Botony Worsted Mills v. United States, 278 U.S. 282, 289 (1929); Tennessee Valley Authority v. United States, 437 U.S. 153, 187-88 (1978); Broom's Legal Maxims 453 (12th Ed. 1960); see also IA Sutherland, Statutes and Statutory Construction, 47.23 (4th ed. 1984); 73 Am. Jur. 2d Statutes 211 (1974). Congress did not indicate that anyone other than the Attorney General could exercise the authority in § 6005(b)(3) and (c). No reference to a designee of the Attorney General is found in the statute. Its express omission is reflexive of congressional intent. There is nothing peculiarly legal about the application of the maximum expressio unius est exclusio alterius in the instant case. It is a product of "legal and common sense." Broom's, supra at 453. "It expresses the learning of common experience that generally when people say one thing, they do not mean something else." Sutherland, supra at 127. If Congress had intended a designee to exercise the power set forth in § 6005(b)(3) and (c), it would have specifically stated so on the face of the statute. It unquestionably set out who could exercise approval authority under § 6003(b). Consequently, the letter of June 26, 1989, fails to waive the procedural requirements articulated in § 6005(b)(3) and (c). Nothing in the legislative history of the act or the decisional law would dictate a different result. See 1970 U.S. Code Cong. and Adm. News, p. 4007.

(2) Even If a Designee Does Have the Authority to Waive 18 U.S.C. § 6005(b)(3) and (c), the Letter of June 26, 1989, From The Department of Justice is Inadequate.

It has been established, supra, that the Attorney General has the power to waive the 10-day notice provision of § 6005(b)(3) and the 20-day notice provision of § 6005(c). However, Appellant submits that the letter of Assistant Attorney General, Carol T. Crawford fails to effectively and legally serve as a waiver. (See Exh. D). The letter states:

June 26, 1989

Michael Davidson, Esquire
Senate Legal Counsel
Room 642
Senate Hart Office Building
Washington, D.C. 20510-7250

Dear Mr. Davidson:

This is in response to your notice dated June 8, 1989, to Attorney General Thornburgh of the intention of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings to apply for an immunity order for William A. Borders, Jr.

The Department of Justice has no objection to the proposed order to compel the testimony of William A. Borders, Jr. and hereby waives the provisions of 18 U.S.C. Section 6005(b)(3) and (c).

By letter of June 9, 1989, the Department of Justice previously responded to your inquiry under the signature of John P. Mackey, Deputy Assistant Attorney General in this office, who was authorized to sign in my absence.

However, to alleviate any concerns the court might have on the Department's views as expressed in the June 9th letter, I again state those views herein.

Sincerely,

Carol T. Crawford
Assistant Attorney General

There is nothing in the record or in the letter which indicates that Ms. Crawford has been duly authorized to act as the Attorney General's designee. There is no evidence that the Attorney General has seen the request or has discussed it with Ms. Crawford. There is no evidence that the Attorney General was unavailable to review the request. There is simply no way to determine if Ms. Crawford is a designee, nor does she assert that she is the designee in the letter. The fact that she is a presidential appointee is not dispositive of the problem. All U.S. Attorneys are presidential appointees. A U.S. Attorney who works for the Department of Education is a presidential appointee. This fact would not give him authority to waive the provisions of § 6005(b)(3) and (c). The statute is silent as to whom a designee of the Attorney General must be or whether there may be a designee.

The wiretap case of United States v. Giordano, 416 U.S. 505 (1974), is similar to this case and is instructive. In Giordano, the Supreme Court of the United States strictly construed 18 U.S.C. § 2516(1) (Title III of the Omnibus Crime Control and Safe Streets Act of 1986). § 2616 states, inter alia:

> [T]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal Judge ... for ... an order authorizing or approving the interception of wire or oral communications.

The Defendant Giordono, a narcotics dealer, challenged evidence derived from a wiretap by the FBI on his telephone. During the suppression hearings, it developed that the initial wiretap had been authorized by the Attorney General's Executive Assistant, not the Attorney General or his specially designated Assistant Attorney General. U.S. v. Giordano, 416 at 510. After a careful review of the statute's legislative history and a thorough analysis of § 2516(1), the Supreme Court held that Congress did not intend the power to authorize wiretap applications to be exercised by any individuals other than the Attorney General or an Assistant Attorney General specially designated by him. Id. at 512-523. Section 2516(1) was intended to limit the power to authorize wiretap applications to the Attorney General and to any Assistant Attorney General he might designate. Id. at 512-514. The purpose of restricting approval of wiretap applications to the Attorney General or his specially designated Assistant Attorney General was to make sure that this critical act of judgment, affecting individual civil rights, was the exercise of mature judgment by a responsible official in the Department of Justice. Id. at 516, 517-518. Accordingly, the authorization or approval of the wiretap application by the Attorney General's Executive Assistant contravened 18 U.S.C. § 2516(1). All evidence derived as a result of such approvals was suppressed.

By analogy, if a designee under § 6005(b)(3) waives the 10-day notice rule, the identity of the designee must be clear and ascertainable. There should be no question as to whether the official is the proper designee of the Attorney General. The rationale of Giordano is applicable here. The individual waiving the 10-day notice period should be a mature, responsible official capable of properly exercising critical judgment as to whether the provision should be waived. We cannot be certain that Carol T. Crawford is such an individual. The legislative purpose of § 6005(b)(3) indicates that this is an important provision. It provides the Department of Justice time to lobby for a change of minds on the part of the Congressional Committee, should the Attorney General object to the grant of immunity. It also gives the Attorney General an opportunity to insulate from a grant of immunity any incriminating data already in his files prior to the witness' testimony. Cammisano, 665 F.2d at 1236.

We submit that the letter of June 26, 1989, fails to reveal whether Carol T. Crawford is authorized to waive the 10-day notice provision. Consequently, compliance with the 10-day notice procedural requirement of § 6005(b)(3) has not been met. The application for immunity was filed too early. The application for an order granting use immunity to Mr. Borders was filed on June 14, 1989. Notice of intent to request the order was given to the Attorney General on June 8, 1989. The application should not have been filed with the Court prior to June 18, 1989, 10-days after notice was given to the Attorney

General. Furthermore, a fortiori, the letter did not effectively waive § 6005(c) which allows the Attorney General to request that the District Court defer subsection (a) for a period, not longer than 20-days from the date of the request for such order. However, § 6005(c) unlike § 6005(b)(3) is not a condition precedent for filing the request for a use immunity order in the District Court. Nevertheless, it was not effectively waived.

(3) The Trial Committee's Analysis of The Respondent's Position Concerning the Proper Interpretation of 18 U.S.C. § 6005 Fails.

In its Memorandum of Points and Authorities, the Trial Committee presents a tortured and awkward analysis of the Respondent's argument that the procedural requirements of § 6005 have not been met. Firstly, the Trial Committee asserts that 18 U.S.C. § 6005 was never intended to benefit a potential witness, but was intended to benefit only the Department of Justice. Thus, Mr. Borders has no valid reason to assert that § 6005 was violated by a failure of proper waiver by the Attorney General. In sum, the Trial Committee argues that § 6005 is not Mr. Borders' affair; it is the business of the Court and the Department of Justice. The Respondent submits that this argument has no force. Louis F. Oberdorfer, District Court Judge, issued an order on June 19, 1989, requiring interested parties to appear at a hearing on June 26, 1989. The hearing concerned the application of the Trial Committee for an order granting use immunity to the Respondent requiring him to testify before the Trial Committee. Mr. Borders appeared with counsel and was allowed to oppose the Application of the Trial Committee without objection from counsel for the Trial Committee. The Department of Justice did not appear. See Transcript of Hearing attached hereto at 1-6. The purpose of the hearing was for the Court to determine if the conditions precedent for filing the Application for Use Immunity under § 6005 had been complied with by the Trial Committee. This was not the usual ex parte proceeding. Mr. Borders was an interested party of record in the case, a de facto intervenor. Further, the District Court Judge accepted the Respondent's position that the signature of one "John Mackey" was not sufficient to waive the requirements of § 6005 (b)(3) and (c). See Transcript of Hearing at 8-12. Obviously, the District Court Judge determined that the procedural requirements of § 6005 (b)(3) and (c) were properly the concern of Mr. Borders. He was allowed to argue and oppose the Trial Committee's application as an interested party. It was pursuant to Mr. Borders' legal position and objection to the validity of the application of the Trial Committee that the trial court insisted the Trial Committee return to the Department of Justice and seek a legally valid waiver. Judge Oberdorfer thought it "prudent to have them [Justice

Department] pull up their socks and file a correct waiver." Transcript of Hearing at 8. The Judge did so primarily because of the presence and opposition of Mr. Borders. Mr. Borders, was the very subject of the Application for Use Immunity. No reasonable man could therefore conclude that the validity of the Application itself was beyond his concern or that he was not an interested party with standing to contest a procedurally defective application. Hence, the Trial Committee's contention that the procedural validity of the Application was not Mr. Borders' concern flies squarely in the face of the fact.

Secondly, the Trial Committee desperately attempts to explain away the Respondent's interpretation of § 6005 by engaging in a confused effort to distinguish United States v. Giordano and 18 U.S.C. § 6003 (b) from § 6005. The Trial Committee's exposition, unsupported by legal authority or legislative history, totally obfuscates the argument of the Respondent made supra at Section A of this memorandum. The argument is not complex. The Application of the Trial Committee was procedurally defective because there was never a proper waiver of the ten-day notice requirement of 18 U.S.C. § 6005 (b)(3). The statute, on its face, does not mention a procedure for waiver. However, the right of the Attorney General to waive the ten-day notice requirement has been established by the decisional law of the circuit. See Cammisano, 655 F.2d at

1236-38. There is no evidence in the legislative history which supports a theory that anyone other than the Attorney General can effect the waiver. The Congress, after careful study, enacted § 18 U.S.C. §§ 6002 - 6005. See Measures Relating to Organized Crime, Hearing on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122 and S. 2292 Before the Subcommittee on Criminal Law and Proceeding of the Senate Committee on the Judiciary, 91st Cong. 1st Sess. 292 (1969) (draft provision § 4). See also S. Rep. No. 617, 91st Cong., 1st. Sess. 55 (1969); see generally II Working Papers, National Commission on Reform of Federal Criminal Law 1406 (1970). See S. 1970 U.S. Cong. and Admin. News, p. 4007. The maxims of statutory interpretation expressio unis est exclusio alterius must be applied. If Congress had intended anyone other than the Attorney General to waive the 10-day notice requirement of § 6005 (b)(3) it could have specifically stated so as it did in § 6003 (b). The Trial Committee totally ignored the preceding argument of statutory construction and erroneously suggested that Respondent relied principally on Giordano. The Respondent in its alternative argument asserted that if a designee is legally acceptable under the statute, then it must be clear to the court that the designee is a mature, responsible individual capable of making mature judgments (as was so in Giordano). At the filing of the Application for Use Immunity, no one knew the identity or official functions of John Mackey or Carol Crawford. It is only at this point in the litigation that we begin to know more about Ms. Crawford. See Memorandum of Points and Authorities of Trial Committee at 14.

The Trial Committee further argues in its Memorandum that

> [o]f the dozens of immunity orders that congressional committees have obtained under 18 U.S.C. § 6005, we are aware of none for which the Attorney General personally corresponded with the Congress about the timing of the order. Rather, all of such correspondence including that relied upon by the Court in Cammisano, was signed by a subordinate Justice Department official. See Cammisano, 655 F.2d at 1234 n.3 (citing waiver 'Letter from Phyllis B. Heymann, Assistant Attorney General, to Michael Davidson, Senate Legal Council (April 15, 1981)').

The simple response to the aforegoing justification for the use of a designee is that in ninety-nine percent of the decided cases, the Application for Use Immunity has been an ex parte proceeding. There was no one to challenge compliance with 18 U.S.C. § 6005. Moreover, the fact that there has never been a case where the Attorney General personally executed a waiver does not make the use of a designee a legally valid procedure. It only reveals that this procedurally infirmed practice has never been challenged.

Finally, the Trial Committee's argument that the passage of time has robbed Mr. Borders' objection of any legal significance is itself of no legal significance. The passage of time does not change the fact that § 6005 (b)(3) was violated when the Trial Committee filed its Application of for Use Immunity too early, on June 14, 1989, as opposed to June 18, 1989, ten days after notice to the Attorney General of its intention to seek a use immunity order in the District Court. The passage of time does not cure the defect and the Trial Committee has cited no legal authority or legislative history in support of its position. Its arguments should be discounted and rejected by this Court.

B. MR. BORDERS' EIGHTH AMENDMENT RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT OBVIATES THE NECESSITY FOR HIS TESTIMONY BEFORE THE TRIAL COMMITTEE.

In 1982, the Respondent, William A. Borders, Jr., was convicted of conspiracy to bribe Judge Alcee L. Hastings and sentenced to prison for five years. Mr. Borders served almost three years in the Allenwood Federal Prison Camp and on December 10, 1985, he was released to enter Hope Village, a halfway house. On February 24, 1986, he was released from Hope Village and paroled until May 27, 1988. In 1982, Mr. Borders also refused to appear before a grand jury in the Southern District of Florida and was held in civil contempt and served 40 days in prison. See In re: Grand Jury Proceedings, Grand Jury

81-1 (Mia.) (William A. Borders, Jr.), Order of July 16, 1982, (S.D. Fla., 1982). In 1988, Mr. Borders was again called before the House Committee on the Judiciary which was holding its impeachment inquiry on the Hastings case. Mr. Borders refused to testify. See Impeachment Inquiry: Hearing Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 100th Cong., 2nd Sess. 225 (1988). The House did not attempt to force Mr. Borders' testimony. Presently, the Senate has called Mr. Borders to testify in the Hastings trial. Mr. Borders has appeared twice and has refused to testify on both occasions. During the July 24, 1989 session before the Trial Committee, Mr. Borders was threatened with multiple contempt citations by Senator Arlen Specter. The preceding scenario reveals only a few facts which indicate that Mr. Borders has been a subject of constant bad faith harassment and unfair treatment by the federal government. See Exh. H, William A. Borders, Jr., Summary Fact Sheet (sets forth other incidents of unfair treatment accorded Mr. Borders by the government or agencies thereof). We submit that the continual harassment and attempts to force Mr. Borders' testimony on issues which he has heretofore refused to testify about constitutes cruel and unusual punishment.

The Eighth Amendment to the United States Constitution proscribes cruel and unusual punishment. The

Supreme Court has interpreted these words in a flexible and dynamic manner and has extended the reach of the constitutional proscription beyond mere barbarous physical punishment. Gregg v. United States, 428 U.S. 153, 171, 173 (1976); see also Rhodes v. Chapman, 452 U.S. 337 (1981). No static test exist by which courts determine whether a particular act of the state or federal government is cruel and unusual punishment. The principle articulated in the Eighth Amendment "must draw its meaning from evolving standards of decency that marks the progress of maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1988). There need be no conscious purpose to inflict suffering to violate the Eighth Amendment. Roberts v. Williams, 456, F.2d 819, 827-28 (5th Cir) cert. denied, 404 U.S. 866 (1971); United States ex rel. Miller v. Twomey, 479 F.2d 701, 719-20 (7th Cir. 1973), cert. denied, 414 U.S. 1141 (1974). Psychological oppression is as much to be condemned as physical abuse, and courts have determined that acts causing mental suffering can, absent bodily harm, violate the Eighth Amendment. LaReau v. MacDougall, 473 F.2d 974, 978 (2d Cir. 1972) cert. denied, 44 U.S. 878 (1973); Wright v. McMann, 387 F.2d 519, 526 (2d Cir 1967). Courts have also recognized that a proscription against cruel and unusual punishment can be violated by the cumulative effect of several "... conditions which, considered independently, might or might not approach the requisite severity." See e.g., Holt v. Sarver, 309 F.Supp. 362, 373 (E.D. Ark. 1970), aff'd, 441 F.2d 304 (8th Cir 1971); United States v. Schuster, 524 F.2d 153, 160 (2d Cir 1975).

Though we are not dealing with physical punishment in this case, the constant attempts on the part of the government (when the cumulative acts are viewed together) to force Mr. Borders' testimony constitute cruel and unusual punishment. Mr. Borders has paid his debt to society by serving a sentence in the federal prison. Yet, over the years he has been constantly subjected to psychologically oppressive punishment by the government's effort to compel his testimony against Judge Alcee L. Hastings. This bad faith harassment on the part of the government is magnified by the fact that the Senate, which now requests that Mr. Borders be forced to comply with its subpoena, believed Mr. Borders would not testify prior to calling him as a witness. Thus, the Trial Committee seeks to inflict punishment by calling Mr. Borders as a witness. In its Memorandum of Points and Authorities the Trial Committee asserts that it "is not presently seeking to punish" Mr. Borders. Id. at 24. They seek "only his testimony, not his punishment." Id. "No punishment is at issue here." Id. ; see also fn. 16, id. However, a review of the Trial Committee's Proceedings on May 18, 1989, makes it clear that the Committee had more than adequate reason to believe Mr. Borders would not testify if called. See Transcript of Proceedings United States Senate Impeachment Trial Committee, Impeachment of Judge Alcee L. Hastings, May 18, 1989 attached hereto as Exh. I. Neither the House nor Judge Hastings called Mr. Borders during their case. Since all parties had reason to believe that Mr. Borders would not testify, we can only reach the conclusion that the issuance of the subpoena by the Senate was a punitive measure calculated to cause more emotional distress to Mr. Borders and for purposes of political expediency. The conduct of the government in its constant effort to force Mr. Borders' testimony has now reached the level that it shocks the conscience and violates fundamental principles of fairness, justice, and decency. See Clappier v. Flynn, 605 F.2d 519 (10th Cir 533). The punishment being inflicted upon Mr. Borders is unnecessary, excessive and violates the dignity of man. Trop v. Dulles, supra at 100. It is cruel and unusual and must not be tolerated by this Court and civilized society. Mr. Borders has paid his debt to society and would like to be allowed to "restructure" his life. See Statement of William A. Borders Before Trial Committee attached hereto as Exh. J. We submit that his position is supported by the vast majority of Americans. Accordingly, any further act by this Court to compel Mr. Borders' testimony before the Trial Committee would violate the constitutional proscription against cruel and unusual punishment.

C. THE ENFORCEMENT OF THE TRIAL COMMITTEE'S SUBPOENA WILL VIOLATE THE RESPONDENT'S FIFTH AND FIRST AMENDMENT RIGHTS.

(1) The Fifth Amendment to the Federal Constitution provides inter alia: No person shall be ... deprived of life, liberty or property, without due process of law. ... There are two distinct forms of due process of law: procedural due process and substantive due process. A procedural due process claim is based upon the allegation that procedures used by a state or the federal government in effecting a deprivation of a life, liberty, or property are inadequate and do not comport with constitutionally required methods or procedures. See Schiller v. Strangers, 540 F.Supp. 605, 613-14 (D. Mass. 1982). Metcalf v. Long, 615 F. Supp 1108, 1118 (D.C. Del 1985). Substantive due process claims assert not a procedural deficiency, but rather a claim that the governmental conduct is inherently impermissible. Substantive due process focuses on the illegal deprivation itself. It is based on the right to be free of state or governmental intrusions into realms of personal privacy through means which are demeaning or harmful and legally unjustified. Hall v. Tawny, 621 F.2d 607, 613 (4th Cir. 1980); Brown V. Brenen, 722 F.2d 360, 366 (7th Cir 1983); see generally L.

Tribe, American Constitutional Law 421-455, 886-900 (1978). A substantive due process violation occurs where the government acts to impair a person's liberty or property rights without a rational basis. Jeffries v. Turkey Run Consolidated School District, 492 F.2d 1, 3 (7th Cir 1974). See also Terrace Knolls v. Dalton, 571 F. Supp. 1086, 1092 (N.D. OH 1983); Bulliad v. Valentine, 592 F.Supp. 774 (ED 1984).

In the instant case Mr. Borders has the right to be free from the constant threat of incarceration. The constant disruption of his personal life by the continued process of governmental harassment, and attempts to force him to testify against Judge Alcee L. Hastings impact on his liberty interest protected by the Fifth Amendment.

The Fifth Amendment also protects a witness from self-incrimination. Mr. Borders has refused to testify before the Trial Committee on two occasions. Though Mr. Borders has been granted use immunity, he has not been granted transactual immunity. See Robinson, Criminal Law Defense, 205, vol. 2 (1984). If Mr. Borders testifies it is possible that information discerned from his testimony might be used to spark an independent investigation against him. Thus, testifying before the Trial Committee would also violate Mr. Borders' right against self-incrimination. See e.g., United States v. Romano, 583 F.2d 1, (1st Cir 1978) (defendant asserted that prosecution was the result of tainted evidence obtained as a result of testimony given before Senate subcommittee under use immunity). Shampansky writes concerning the preceding case:

> The constitutionality of granting a witness only use immunity, rather than transactional immunity, was upheld in Kastigar v. United States, 406 U.S. 441 (172). In United States v. Romano, 583 F.2d 1 (1st Cir. 1978), the defendant appealed from his conviction of several offenses on the ground, inter alia, that the prosecution's evidence had been derived, in part, from immunized testimony that he had given before a Senate subcommittee. Although the conviction was affirmed, the case illustrates the difficulty that the prosecutor may have in establishing that its evidence was not "tainted" but rather was derived from independent sources. ...

J.R. Shampansky, Congress' Contempt Power 41 (1986).

Accordingly, enforcement of the subpoena of Trial Committee will infringe Mr. Borders' right to self-incrimination as well as his substantive due process rights.[1]

---

[1] The wisdom of forcing a witness to testify against others should be carefully considered where the moral principles of the witness may be compromised. Judge Wyzaniki of the First Circuit observed:

> It cannot but give pause to any sensitive man to be required to report the misconduct of others, especially if he knows them, even if they are not his formal partners, his social friends, or his blood relatives. A court should move slowly to impose such a requirement, [and] ought to remember that it may offend a man's conscience. ...

United States v. Worchester, 190 F. Supp. 548, 568 (D.C. MA. 1961)

(2) Moreover, Mr. Borders' first amendment right to privacy will be violated if he is forced to testify before the Trial Committee. The Supreme Court has held that the First Amendment restricts Congress's right in conducting investigations. Watkins v. United States, 354 U.S. 178, 197 (1957). In Barenblatt v. United States, 360 U.S. 109, 112 (1959) the Supreme Court ruled that "where first amendment rights are asserted to bar government interrogation [,] resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." Id. at 126. In balancing the individuals personal interest in privacy against the congressional need for information "the critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness." Id. See Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963) (court ruled in favor of a witness who invoked his first amendment rights in response to questioning by a state legislative committee). In Gibson, Justice Goldberg stated that "an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition [is] that the State con-

vincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest. Id. at 546.

In the instant case the state has no compelling state interest or overriding need for the information which Mr. Borders might have. Mr. Borders has refused to testify and the likelihood of the Trial Committee securing his testimony is very slight. Mr. Borders' right to privacy when balanced against the Congress's need for information against Judge Hastings is the more important value. The Trial Committee did not contend that it will be unable to complete its task without the testimony of Mr. Borders. The dictates of right, reason, fundamental principles of justice and fairness require that Mr. Borders be left to restructure and pursue his life free of governmental coercion and intrusion. Therefore, this court should refuse to impinge upon Mr. Borders' right to privacy by compelling him to testify before the Trial Committee.

D. THE RESPONDENT HAS APPEALED THE DISTRICT COURTS ORDER OF JUNE 27, 1989 GRANTING USE IMMUNITY.

On June 27, 1989, Judge Louis F. Oberdorfer issued an order granting the Trial Committee's request giving use immunity to Mr. Borders. The order specifically stated that the procedural requirements of 18 U.S.C. § 6005 had timely filed a Notice of Appeal in the United States Court of Appeals for the District of Columbia. On July 25, 1989, Mr. Borders filed a Motion to Stay the District Court's Order of June 27, 1989. The Motion to Stay Pending Appeal was denied. Mr. Borders then filed a Motion to Stay Pending Appeal in the U.S. Court of Appeals for the District of Columbia Circuit on July 31, 1989. Both Mr. Borders' Motion to Stay and his Appeal are pending before the Court of Appeals. Consequently, it is important that the status quo be maintained so that Mr. Borders' appeal is not mooted by a decision of this Court. Compelling Mr. Borders' testimony at this pcint would result in a hollow victory if he were subsequently to be successful on appeal. The Trial Committee also indicated that it will immediately seek civil sanctions against Mr. Borders if this Court rules in its favor. Memorandum of Points and Authorities of the Trial Committee at 27. It is therefore important that this Court delay any decision on the merits of this case until the Court of Appeals has spoken.

The Respondent must also observe that civil contempt is a coercive measure designed to secure compliance with a court order. Shillitani v. United States, 384 U.S. 364, 370-72 (1966). When coercive incarceration loses its coercive effect and does not result in compelling testimony, the confinement is no longer rationally related to its stated purpose and the confinement must cease. Id. at

371; Jackson v. Indiana, 406 U.S. 715, 731 (1972); McNeil v. Director, Patuxent Institute, 407 U.S. 245, 250 (1972). Due process requires that the individual must be released if there is no chance the witness will comply with the courts order. Shillitani at 271. If incarceration has no coercive effect, then it becomes punitive and should be discontinued. Lambert v. Montana, 545 F.2d 87, 89 (9th Cir 1976); See In re Parish, 782 F.2d 325, 327 (2d Cir 1986); Soobzokov v. CBS, Inc., 642 F.2d 28, 31 (2d Cir 1981).

Since Mr. Borders has refused to testify before a grand jury, the House of Representatives, and the Trial Committee on two occasions, the court must proceed cautiously in complying with the request of the Trial Committee that he be held in civil contempt for any further failure to comply with this Court's subpoena or order to testify. Since holding Mr. Borders in civil contempt would be a punitive measure, we submit that any request that Mr. Borders be so held be denied.

III. CONCLUSION

Accordingly, predicated upon the aforegoing legal analysis, the Respondent, William A. Borders, Jr., respectfully request that the Trial Committee's Application for the Enforcement of the Subpoena of the Senate Impeachment Trial Committee be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST
JUDGE ALCEE L. HASTINGS,

Applicant,

v.

WILLIAM A. BORDERS, JR.,

Respondent.

Misc. No. 89-129 (LFO)

REPLY IN SUPPORT OF APPLICATION TO ENFORCE SUBPOENA OF SENATE IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS

In this reply of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, we will respond, in part 1, to William A. Borders, Jr.'s contentions that this Court's immunity order is procedurally defective and, in part 2, to his argument that his bribery conviction and brief period of confinement for civil contempt in 1982 give him a privilege against testifying before the Committee. In part 3, we will describe our request to this Court for an order which, if the Court determines that Mr. Borders has no privilege against testifying, would expeditiously secure the Committee's entitlement to his testimony "forthwith" in accordance with 28 U.S.C. § 1365(b)(Supp. V 1987).

Before turning to those matters, we would like to lay to rest Mr. Borders' assumption that the Committee's subpoena to him is intended to obtain information "against" Judge

Hastings.[1] The Committee is engaged in one of the most exacting functions that any committee of the Congress can ever perform: compiling the evidentiary record upon which the Senate may exercise its sole power under the Constitution to try a United States judge on articles of impeachment preferred by the House of Representatives. Mr. Borders was indicted, and convicted, for conspiracy to solicit a bribe for Judge Hastings. Although the parties made a tactical decision not to call Mr. Borders as a witness, the Committee determined that "the Senate's task is more than that of resolving a private controversy between the House and Judge Hastings. The Senate has the sole power under the Constitution to remove from office a life-tenured judge, a decision which has implications not only for the judge involved but [for] our constitutional system. In the light of the Senate's unique responsibilities, the Committee concluded that it should not allow the tactical decisions of the parties to foreclose the Senate's opportunity to hear and to evaluate Mr. Borders' testimony." S. Rep. No. 98, 101st Cong., 1st Sess. 11 (1989).

The Committee made clear in its report to the Senate that "[t]he decision to call Mr. Borders was not intended to favor either the House or Judge Hastings. The Committee has no preconception about whether Mr. Borders' testimony would favor one side or the other. Rather, it has concluded that the effort to find the truth, whoever may be favored by it, would be aided by hearing from the one person other than the respondent who has personal knowledge of it." Id. at 10. In agreeing to the resolution to authorize this civil enforcement action, the Senate "endorse[d] and ratif[ied] the committee's determination that its subpoena is an appropriate means of fulfilling its responsibility to report the evidence in this impeachment to the Senate." 135 Cong. Rec. S10012 (daily ed. Aug. 3, 1989)(Sen. Mitchell). There is simply no basis, therefore, in Mr. Borders' assumption that the Committee is seeking to obtain testimony "against" Judge Hastings.

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[1] See, e.g., Opposition to Application at 32 ("Mr. Borders' right to privacy when balanced against the Congress's need for information against Judge Hastings is the more important value.").

1. This Court's Immunity Order Is Valid

Aware that Mr. Borders had invoked his privilege against self-incrimination when he had been called to testify by the House at its impeachment proceedings, the Committee had earlier voted to obtain a court order immunizing Mr. Borders' testimony from use against him in a criminal prosecution, should he be called to testify. Exhibit 5 to Application. Following the Committee's filing of an application for an immunity order, District Judge Louis F. Oberdorfer scheduled a hearing on the application. At the hearing, Mr. Borders objected, through counsel, that the letter from the Department of Justice accompanying the immunity application, which disclaimed the Department's interest in delaying the issuance of the immunity order, did not identify the signatory's position or authority in the Justice Department.

Agreeing that "I don't know who he [the signatory] is," Transcript of Hearing, June 26, 1989, Exhibit 9 to Application, at 8, Judge Oberdorfer suggested that he hold the application to permit the Committee to obtain and file a letter from "somebody [at the Department of Justice] who is a presidential appointee." Id. at 12. Judge Oberdorfer did not rule as Mr. Borders asserts, Opposition at 3, that the Committee's application was defective. Rather, he stated, "I understand all of the arguments on the merits why this is possibly an unnecessary precaution, but I would feel more comfortable if you obtain from the United States a waiver signed, if not by the Attorney General personally, at least by a presidential appointee or at least by someone who can be identified." Id. at 10-11. Judge Oberdorfer explained, "I just do not think it is worth it to give somebody an issue on appeal." Id. at 10.

The next day the Committee filed a letter signed by the Assistant Attorney General for the Office of Legislative Affairs (Exhibit 10 to Application), and Judge Oberdorfer issued the immunity order (Exhibit 11 to Application).2/

2/ In addition to asking for a letter by "a presidential appointee or at least by someone who can be identified," Judge Oberdorfer asked that we "get somebody to ratify or at least verify to me who Mr. Mackey is ... [and] why don't you let them tell me on the record, in addition, that they have no opposition to the immunity." Exhibit 9 to Application, at 11-12. (footnote continued)

Mr. Borders appeared before the Committee in response to the subpoena (Exhibit 12 to Application), and the immunity order was read to him by the Chairman. Transcript of Proceedings, Impeachment Trial Committee, July 24, 1989, Exhibit 13 to Application, at 1956. Mr. Borders' immunization furnished him with absolute assurance that "no testimony ... or any information directly or indirectly derived from such testimony ... may be used against him in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order." Id. Despite this guarantee, Mr. Borders refused to answer any of the Committee's questions or to testify about his knowledge of whether Judge Hastings committed the acts alleged by the House.

Mr. Borders has no privilege from testifying under the Fifth Amendment, because "the grant of immunity has removed the dangers against which the privilege protects." Kastigar v. United States, 406 U.S. 441, 449 (1972). In Kastigar the Supreme Court established that use immunity precisely like that given to Mr. Borders "is consonant with Fifth Amendment standards." Id. at 453. The Court "h[e]ld that such

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The Department's June 26, 1989 letter, Exhibit 10 to Application, meets all the requirements described by Judge Oberdorfer. It was signed by Carol Crawford, a presidential appointee, who identified Mr. Mackey, the signer of the original waiver, as "Deputy Assistant Attorney General [for Legislative Affairs], who was authorized to sign in my absence." The letter reiterates that the Department of Justice has no objection to the order sought by the Committee.

immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." Id. at 453. The objection that Mr. Borders raises, Opposition to Application at 29, that a witness cannot be compelled to testify without transactional immunity, was the precise issue in Kastigar and was decided adversely to the witness. Id. at 453. The use immunity that Mr. Borders has received "is all that the Constitution requires" to compel his testimony. Id. at 459.

Thus, Mr. Borders' immunization removes any bona fide concern about the potential use of his testimony against him. In order to accommodate his strongly held preference not to testify, Mr. Borders has constructed an alleged procedural defect in the process by which this Court immunized him. As we described in the initial memorandum supporting our application, the immunity order is valid and effective. The Department of Justice chose to communicate its views to the Senate about the timing of Mr. Borders' immunity through a letter from an Assistant Attorney General, which is the communicative path that the Department of Justice has used to perform this task in countless prior proceedings.3/

3/ Contrary to Mr. Borders' statement, this means of communication has been used in prior contested, as well as uncontested, applications. See, e.g., In the Matter of the Application of the United States Senate Permanent Subcommittee on Investigations (Cammisano), 655 F.2d 1232, 1234 n.3 (D.C. Cir.), cert. denied, 454 U.S. 1081 (1981). Also, in Cammisano, the Court (footnote continued)

The submission of the letter from the Assistant Attorney General establishes beyond question the Department of Justice's acquiescence in the Court's immunizing Mr. Borders on June 27, 1989. As this Circuit held in Cammisano, the notice provision "was plainly intended to benefit solely the Department of Justice. And in view of that intent, it would be anomalous to hold that the notice requirement ... must ... be administered in a manner antithetical to the interests of the Department." 655 F.2d at 1236 (emphasis in original). There is no warrant under the immunity statute and this Circuit's "common sense" implementation of the notice provision, id., to impose the requirement sought by Mr. Borders, that the Attorney General personally sign all immunity letters to the Congress.[4]

Further, the Court need not even plumb the intricacies of the notice provision because the ten-day notice requirement is no longer relevant to this proceeding. The question whether a letter from the Assistant Attorney General or Deputy Assistant Attorney General was sufficient to support an application by the Committee before the expiration of the ten-day notification

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relied upon prior practice in interpreting the mechanics of the notice provision. See id. at 1236 n. 19 (citing prior Justice Department waiver of notice requirement).

[4] As we discussed in our opening memorandum, the congressional immunity provision, 18 U.S.C. § 6005, does not contain the specific restrictions on Department of Justice officials who may act under the statute that are contained in 18 U.S.C. § 6003 and the wiretap law involved in United States v. Giordano, 416 U.S. 505 (1974). Accordingly, these authorities not only do not support Mr. Borders' argument, but also provide a conclusive basis for distinguishing the notice requirement of section 6005.

period became purely academic to this proceeding once the ten-day period following the Committee's June 8, 1989 notification to the Attorney General passed on June 18, 1989. The Court granted the immunity order on June 27, 1989 -- 19 days after notice was given to the Attorney General. Mr. Borders refused to testify on July 24 and July 27, 1989 -- 46 and 49 days, respectively, since notice. At the time of our present request that the Court issue an order requiring Mr. Borders to testify before the Committee, 69 days have elapsed since the Committee notified the Attorney General. Thus, the Department of Justice has had nearly seven times the ten-day period provided by the immunity statute to "lobby" the Committee "for a change of mind," Cammisano, 655 F.2d at 1236, on immunity for Mr. Borders, but of course it has not done so because its prosecutorial interest in Mr. Borders was resolved with his conviction in 1982.

Mr. Borders' position appears to be that, having filed its initial application prematurely (before June 18) on June 14, the Committee lost its right to obtain a timely immunity order (after June 18) on June 27, or is required to file a new application, obtain a second, identical immunity order, and perhaps resummon Mr. Borders in order to hear his refusal once again to testify on the basis of his constitutional objections under the Eighth and other Amendments. This Circuit has rejected similar efforts to maintain a jurisdictional bar to an action based on its initiation in advance of a statutory waiting period, once the period had expired and "the latent jurisdictional infirmity disappeared." Aetna Casualty and Surety Co. v. Circle Equipment Co., 377 F.2d 160, 163 (D.C. Cir. 1967). In the absence of any injury to the Department of Justice or Mr. Borders, "the policy goals sought to be achieved by the statute," id. at 164, require the same result here.[5/]

2. Mr. Borders Has No Constitutional Privilege Against Testifying

No other provision of the Constitution furnishes Mr. Borders with a privilege from testifying before the Committee. Mr. Borders alleges that he "has been a subject of constant bad faith harassment and unfair treatment by the federal government" and "that the continual harassment and attempts to force Mr. Borders' testimony on issues which he has heretofore refused to testify about constitutes cruel and unusual punishment." Opposition to Application at 24. Mr.

5/ Nor does the pendency of Mr. Borders' appeal from the immunity order undermine the order's validity or alter his obligation to comply with the Committee's subpoena. This Court denied Mr. Borders' application for a stay pending appeal, because "[i]t is unlikely that Mr. Borders will prevail on the merits of his appeal," Memorandum, July 26, 1989, Exhibit 14 to Application, at 1, and the court of appeals has not acted upon Mr. Borders' stay application. Because the immunity order has not been stayed, it is in effect and must be obeyed. As the court of appeals explicitly noted in denying our motion to expedite the motion to dismiss his appeal or summarily affirm, notwithstanding the pendency of the appeal, "if [Mr. Borders] refuses to comply with [the] district court's order filed June 27, 1989, [the Committee] may seek enforcement through civil contempt proceedings." Order of July 26, 1989, No. 89-5189 (D.C. Cir.). Cf. United States v. Nightingale, 703 F.2d 17, 19 (1st Cir. 1983) (per curiam) ("The defendants here cannot be absolved of their contemptuous conduct because they appealed the validity of the court's orders.").

Borders offers no legal authority, and there is none, for the proposition that requiring someone with relevant knowledge to testify in a proper government proceeding constitutes punishment, let alone is "cruel and unusual."

The Supreme Court has established that the Eighth Amendment's "proscription against cruel and unusual punishment ... was designed to protect those convicted of crimes." Ingraham v. Wright, 430 U.S. 651, 664 (1977). Accordingly, the Court has rejected every claim that "impositions outside the criminal process constituted cruel and unusual punishment" and "has had no difficulty finding the Eighth Amendment inapplicable." Id. at 667-68. More specifically, the Court has "sustained a judgment of civil contempt, resulting in incarceration pending compliance with a subpoena, against a claim that the judgment imposed cruel and unusual punishment." Id. at 668 (citing Uphaus v Wyman, 360 U.S. 72 (1959)). The Court noted that "'[s]uch coercion, where the defendant carries the keys to freedom in his willingness to comply with the court's directive, is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees.'" Uphaus, 360 U.S. at 81 (quoting Green v. United States, 356 U.S. 165, 197 (1958) (Black, J., dissenting)). Requiring Mr. Borders to testify does not implicate his Eighth Amendment rights in any way.

Nor does requiring Mr. Borders to obey the Committee's subpoena implicate his due process rights. "The power of government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence." Kastigar, 406 U.S. at 443. "Every citizen of course owes to his society the duty of giving testimony to aid in the enforcement of the law." Piemonte v. United States, 367 U.S. 556, 559 n.2 (1961). The obligation to testify before a congressional committee is equally well-established:

> It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation.

Watkins v. United States, 354 U.S. 178, 187-88 (1957). In short, "the broad power to compel residents to testify" in official government proceedings causes no violation of witnesses' due process rights, but is "[a]mong the necessary and most important of the powers of ... the Federal-Government to assure the effective functioning of government in an ordered society." Murphy v. Waterfront Commission, 378 U.S. 52, 93-94 (1964) (White, J., concurring).

The fact that Mr. Borders was convicted of a criminal offense, and served a prison sentence, for his involvement in events upon which the Committee is taking testimony does not alter his obligation to assist the Committee by testifying. As the Supreme Court has observed, "an accomplice who is thereafter imprisoned for his participation ... has no more right to keep silent than" does "an innocent bystander," as "'[t]he public has a right to every man's evidence.'" Piemonte, 367 U.S. at 559 n.2 (quoting 12 T. Hansard, Parliamentary History of England 693 (1812)). "The existence of [immunity] statutes reflects ... the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime." Kastigar, 406 U.S. at 446.

Mr. Borders' immunization pursuant to law provides the full reconciliation between his constitutional interests as a participant and potential witness and "the legitimate demands of government to compel citizens to testify." Id. The Committee has a legitimate need for Mr. Borders' testimony, and he has no privilege against testifying.[6/] Accordingly, the Committee is entitled to his testimony, and the Court should order Mr. Borders to comply with the Committee's subpoena.

[6/] Requiring Mr. Borders to testify about his knowledge of the criminal bribery conspiracy between himself and Judge Hastings alleged by the House does not abridge Mr. Borders' First Amendment rights or right to privacy. There can be no serious question that the constitutionally mandated inquiry in which the Committee is engaged is "a legitimate task of the Congress." Watkins, 354 U.S. at 187. Nor can there be a serious contention that the Committee is seeking "to expose the private affairs of individuals without justification in terms of the functions of the Congress." Id. Mr. Borders is a central participant in the conduct underlying the articles of impeachment against Judge Hastings. "[T]he interest of the Congress in demanding disclosures," id. at 198, from Mr. Borders is of obvious overriding public and constitutional importance.

3. The Procedure Requested by the Committee

Except for Mr. Borders' testimony, for which its trial record remains open, the Committee has completed its evidentiary proceedings. The Committee is currently working on its report to the Senate, which it will transmit to the Senate with the record of its evidentiary proceedings by the middle of September. The Committee's need for Mr. Borders' testimony is immediate so that its evidentiary record and its report to the Senate will be complete, or that it will be able to supplement that report with an additional report on Mr. Borders' testimony before the Senate hears final arguments and votes on the articles of impeachment in October.

In light of the Committee's great and immediate need for Mr. Borders' testimony, the Committee respectfully requests that the Court order Mr. Borders to testify before the Committee on all matters pertinent to the articles of impeachment and to notify the Committee in writing, and file a copy of that notification with the Clerk of this Court, by no later than the first business day following the Court's order whether he intends to do so.7/ The Committee requests that this Court further order that, if Mr. Borders refuses to comply with this Court's order to testify, he present himself in person before this Court at a prescribed time that same

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7/ In Cammisano, the witness's refusal to obey this Court's order that he testify was established by a stipulation rather than by having the witness appear personally before the committee and reiterate his refusal to testify. 655 F.2d at 1235.

day to show cause why he should not be held in contempt of this Court and why civil sanctions should not be imposed to coerce obedience to the Court's order. A proposed order accompanies this reply.

Respectfully submitted,

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Committee on the Articles Against
Judge Alcee L. Hastings

Dated: August 16, 1989

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS,

Plaintiff,

vs.

WILLIAM A. BORDERS, JR.

Defendant.

Docket No. Misc. 89-0129

Washington, D.C.
August 17, 1989
10:15 a.m.

TRANSCRIPT OF CONTEMPT HEARING
BY THE HONORABLE GEORGE H. REVERCOMB
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:
MESSRS. MICHAEL DAVIDSON,
Senate Legal Counsel, and
MORGAN J. FRANKEL,
Assistant Senate Legal Counsel
642 Hart Senate Office Building
Washington, D.C. 20015

FOR THE DEFENDANT:
MR. MICHAEL S. ROSIER
1420 K Street, N.W.
Washington, D.C. 20005

ALSO PRESENT:
MR. WILLIAM A. BORDERS, JR.

OFFICIAL COURT REPORTER:
ANNELIESE J. THOMSON
6814 U.S. Courthouse
Third and Constitution, N.W.
Washington, D.C. 20001
(202) 842-5069

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

THE COURT: Call the special proceeding.

THE CLERK: Yes, sir. Miscellaneous Case No. 89-0129, Impeachment Trial Committee on the Articles against Judge Alcee L. Hastings versus William A. Borders, Jr., Mr. Davidson and Mr. Frankel represent petitioners, and Mr. Rosier represents the respondent.

THE COURT: Mr. Davidson, are you going to argue for the Committee?

MR. DAVIDSON: Yes, I will.

THE COURT: I'll be glad to hear from you first. I believe I understand the factual background, but I don't want to impede you from going into any matters you think are relevant to the Court's decision.

As I understand, essentially I'm here this morning to rule on the objections of the defendant to the enforcement of the subpoena.

MR. DAVIDSON: That is correct. Under the Subpoena Enforcement Statute, which was passed in 1978 in large part at the instance of the courts in this Circuit, which had suggested in various ways to the Congress that there be a method of civil enforcement of Senate and House impeachments, this statute for the Senate only, there are two phases to the process.

In this first phase, the Committee has applied to the Court for an enforcement order, and it is the respondent's opportunity to state his objections to the Committee's subpoena and for the Court to rule whether the respondent should be required to answer the Committee's questions.

Then if the Court were to order the respondent to answer the Committee's questions and the respondent would refuse to do so, the second phase would be a determination whether the respondent should be held in civil contempt and civil sanctions required to induce compliance with the Court's order.

There are two sets of issues that are presented by, by this matter. Understanding that the respondent would likely assert a privilege under the Fifth Amendment, the Committee began in May the process of securing an immunity order. Under the statute, the Committee is required to vote, and it did so in early June, to do so by a two-thirds vote, and that is to assure that there is a sufficient interest in the Congress in obtaining an immunity order requiring the witness's testimony. The second part of the process involves notification to the Department of Justice.

As that relationship, the relationship of advising the Attorney General and then hearing the Attorney General's response or waiting for a period of time is a relationship between the two branches of Congress and the Attorney General to allow the Attorney General fair notice to come up to the

Congress, to lobby it if he wishes to persuade the Congress not to immunize a witness, or if the Attorney General has a current prosecutorial interest in a witness, to seal his records so that his prosecutors may demonstrate an independent source for evidence. We have worked out a manner of proceeding with the Department over the years.

Back in May, even before any formal notification was provided, you will see in the exhibits that the Witness Immunity Unit in the Criminal Division was notified of the Committee's likely intention to pursue immunity, so that it had several weeks advance notice that there may be, in fact, a formal notification.

The Witness Immunity Unit checks the various indices in the Department to determine whether there is any unit of the Department, in the Criminal Division or otherwise, that has an interest in prosecuting a potential witness. From then on, after the Committed voted, we formally notified the Attorney General.

Now we did that in the manner that has been worked out and has successfully allowed for communications between the Department and the Senate, by sending our notice of intention to the Attorney General through the Office of Legislative Affairs.

THE COURT: I don't object to your going into all of this history, but Judge Oberdorfer, as I understand it, has already ruled denying the stay of the immunity order pending appeal, and the Court of Appeals has already ruled that it will not give an expedited hearing on that, so that the law of the case, as I understand it, is Judge Oberdorfer's denial of any stay of the immunity order.

Now the immunity order has been issued by him.

MR. DAVIDSON: The immunity order was issued, and it was then communicated to the witness at a hearing, and it is our view that it is an effective immunity order, it is unstayed, and it did require the witness to --

THE COURT: Mr. Borders on July 24 refused to answer questions.

MR. DAVIDSON: He refused on the 24th. In order to allow him time to seek a stay, he was asked to come back on the 27th. In the interim, he did apply to Judge Oberdorfer for a stay, and that stay was, was briefed and denied, returned, but he once again refused to answer questions.

We think the immunity order is wholly effective. It is the law of this case, and it's a proper order. The Department had notice. The Department has no intention of prosecuting Mr. Borders. It communicated back to the Congress in a conventional way through an Assistant Attorney General for the Office of Legislative Affairs.

Mr. Borders' second set of objections are constitutional objections that are outside of the Fifth

Amendment and outside of the scope of the immunity order, and basically it is a claim under the Eighth Amendment that requiring him to testify is cruel and unusual punishment, but that clause deals with crimes, deals with punishment.

The requirement that he testify is not punishment, but simply a citizen's obligation to provide information that he has and which is of critical importance to the Senate in these proceedings.

THE COURT: The Supreme Court has held directly in the Ingraham case that the Eighth Amendment is indeed not applicable to civil contempt proceedings.

MR. DAVIDSON: That is, that is correct. It is an explicit ruling, and none of the other constitutional defenses that the witness would assert carry in this proceeding. He has no First Amendment right to deny to the Senate in this impeachment proceeding his knowledge of these events.

I would feel comfortable in resting on that, unless the Court had some further questions.

THE COURT: Well, I want to hear fully from Mr. Rosier as to his objections to the immunity order, not rehashing the law of the case, but the objections that he wishes to raise with this Court, his constitutional grounds. Actually, he's now raising objections to testifying, as I understand it, on Eighth, Fifth, and First Amendments, and I'd be glad to hear your objections on those grounds at this time, Mr. Rosier.

MR. DAVIDSON: If I could only after hearing that fuller explanation have a chance to respond, I'd appreciate it.

THE COURT: Yes, sir.

MR. DAVIDSON: Thank you.

MR. ROSIER: Judge, I think at this point in time, the matter which is before this Court is the applicability of the attempt to have immunity granted. The statute under which the, this Court is conferred with the decision-making process with regard to the immunity after the Senate has complied with the two-thirds requirement relates only to the Fifth Amendment, self-incrimination only.

Statute 18 U.S.C. 6005 relates only to rights which are asserted with regard to self-incrimination. Any other claims which are raised are beyond the context of that statute and beyond the context of this proceeding. At this point in time, we would simply state that the stay of immunity has been denied, as the Court --

THE COURT: Sir?

MR. ROSIER: The stay of immunity was denied, as the Court had correctly stated.

And we are of the position that that relates only to the Fifth Amendment privilege as it relates to the right of self-incrimination. It does not relate to the Fifth Amendment due process, it does not relate to the Fifth

Amendment as it relates to double jeopardy and any other constitutional grounds which we asserted.

The only issue before this Court at this point in time is the applicability of 18 U.S.C. 6005, which is narrow in its scope only to a refusal to testify based on self-incrimination.

There were several other grounds which were stated --

THE COURT: Well, why aren't those before me if Mr. Borders is refusing to testify before the Committee on those grounds?

MR. ROSIER: Because of the fact that the immunity statute which attempted to, purported to -- and it is on appeal notwithstanding the stay, the denial of the stay is currently on appeal -- is narrow in scope. It relates only to the Fifth Amendment right of self-incrimination. No other constitutional provision is --

THE COURT: Are you withdrawing those grounds?

MR. ROSIER: That is not what I'm saying. That is not what I'm saying. I'm saying there is only one issue that is here under consideration. There is only one statute here under consideration, and that statute can be narrowly construed or literally construed --

THE COURT: You want to argue the use immunity and its scope and why the Fifth Amendment, why under the Fifth

Amendment he should not be compelled to testify, although granted, you submitted immunity, I'd be glad to hear from you, but as I understand it, you also objected to his refusing to testify and raised Eighth and First Amendment grounds.

I must say to you that it seems to me those Eighth and First Amendment grounds are ones which I'm not sure I understand the basis for them, particularly the First, but I've read your submission on that, and I'd be glad to hear from you on it.

MR. ROSIER: What I'm saying to the Court at this time is that there were other constitutional grounds raised --

THE COURT: Yes.

MR. ROSIER: -- and the constitutional grounds that are raised are beyond the scope of this proceeding.

THE COURT: Why do you say that, sir?

MR. ROSIER: Because the statute, 18 U.S.C. 6005, relates only to a defendant's or a witness's refusal to testify on the basis of the Fifth Amendment right to self-incrimination. It does not speak to the right of due process of law. It does not speak to the Fifth Amendment right of double jeopardy. It does not speak to any other section of the Constitution.

THE COURT: Are you challenging the plaintiff's right to enforce this appeal?

MR. ROSIER: This is not -- they have a right to challenge it. I mean, it is up to the Court to make an appropriate decision, but what I am saying to the Court at this time is that the statute that we are here on today is narrow in scope. It relates to only one constitutional issue in this proceeding, although there are other constitutional issues that will be raised in appropriate forums.

I'm saying in this forum, there is only one issue.

THE COURT: What forum are you referring to?

MR. ROSIER: The forum of the United States Senate. At that point, we can raise the issues, the other issues that are beyond the scope of the statute which purports to grant him immunity based on one constitutional provision.

THE COURT: Weren't those raised when he refused to testify on July 24?

MR. ROSIER: He asserted those rights as well as his, his personal convictions.

THE COURT: Yes.

MR. ROSIER: That's where we stand today.

THE COURT: Do you want to make a point? Do you want a ruling? I quite frankly must state to you that there is, he does have the basic obligation to assist the Committee by testifying, and case law recognizes that a, some offenses are of such a character that only the persons capable of giving useful testimony are those that were implicated in the crime, and therefore the grant of use immunity, which has been specifically upheld in a well known case, the Kastigar case, does strike some balance between the legitimate demands of the government to compel citizens to testify and their right against, or their witness's constitutional interest; and I don't know what argument you can make with regard to that.

He has been granted use immunity, which means, of course, that anything he says before the Senate cannot be used against him.

MR. ROSIER: I understand.

THE COURT: And the fact that he has been convicted, if you want to argue that aspect of it, I want to hear your argument, and I'm here to hear those arguments.

MR. ROSIER: Well, basically what I, what I'm saying to the Court -- I hear clearly what the Court is saying, and I understand what the Court is saying, but what I am suggesting to the Court is that there's only one issue here before the Court at this point in time.

If this is an attempt to compel his testimony under 18 U.S.C. 6005, there's only one issue to consider: whether or not the use immunity is applicable. If that were the only issue --

THE COURT: Are you going to argue that or submit it?

MR. ROSIER: I am not arguing that. I will stand on what was in the brief with regard to that issue.

THE COURT: All right. Do you want to reply, Mr. Davidson? Do you understand Mr. Rosier's effort to limit this hearing to one issue and not to the other objections that he raised before the Senate Committee?

MR. DAVIDSON: He raised those objections before the Subcommittee -- or the Committee. The Committee ruled, directed the witness to answer. This proceeding is not under the immunity statute. It's under the civil enforcement statute that brings us here today, and it's to hear whatever objections the witness has to offer.

If the witness is limiting his case to his Fifth Amendment issue in whether he's been effectively immunized, we're happy to limit the case to that and think that those grounds have been adequately covered and that the Court should now direct the witness to, to return to the Committee and to testify forthwith.

THE COURT: Thank you. Anything further from either counsel?

MR. ROSIER: One second, your Honor.

Judge, what I'm suggesting to the Court is not that we are waiving any other arguments that were asserted in our brief, but only that we feel that the only provision that is applicable under the purported grant of immunity which is currently on appeal, notwithstanding the stay has been denied, is that the scope of this proceeding is, in our opinion, limited to that narrow provision.

However, we are not at this point in time waiving any other constitutional grounds which have been previously asserted or referred to in our, in our brief and memorandum.

THE COURT: This case is brought to enforce the subpoena. As I understand, it's brought pursuant to 28 U.S.C. 1365(a), which specifically authorizes the Senate to bring a suit to enforce a subpoena.

That statute gives the person that is being ordered to testify a chance to challenge the validity of the subpoena, and that's why you're here, and the only objection I've heard, you seem to want to narrow it to the use immunity.

You raised, however, before the Senate the Eighth Amendment issue, which the Court is going to dispose of, because it's been specifically held by the Supreme Court in Ingraham v. Wright that it is not cruel and unusual punishment to require you to testify with regard to a judgment of civil contempt resulting in any incarceration that could result or any other sanction that the Court would impose.

So I specifically note that the Eighth Amendment objection is, is incorrect in the opinion of the Court.

Insofar as the First Amendment argument, it's the Court's opinion that the importance of the matter before this

Senate, the impeachment proceedings, should override any privacy interest that may be involved, and I have no trouble reaching that conclusion.

I don't know of any authority that a person may refuse to testify because of a right to privacy. I've never heard that argument or read any authority supporting it.

There's likewise an argument made that Mr. Borders has a liberty interest in being free of the constant threat of incarceration. Of course, in any civil contempt proceeding, the defendant always has the opportunity to relieve himself of any threat of incarceration, and that is by complying with an order of the Court to testify, a lawful order, as well as the authority of the Senate in this case to compel his testimony.

The issue before the Court on the use immunity through -- I must say, Judge Oberdorfer's order is clear in that the prosecutor may not use any testimony against him in any, in any way, any testimony of his as distinguished from transactional immunity.

But he has been granted immunity, and the law of the case is that it's been properly granted, and the Court will order Mr. Borders to testify when required by the Senate. That is the ruling of the Court, when required by the Committee.

Mr. Davidson, there was one matter in your pleading which I don't know that I want an elaboration on, but it occurs to me that I, that the appropriate way to proceed would be to, for this Court to be advised as to when the Committee wants his testimony and to order him to forthwith give it at that time.

Now if that's a half an hour from now or this afternoon or tomorrow morning, if the Committee is sitting, and you'll have to advise me of that, or if it's at another time, but to -- you requested relief in the form that the Court should order him to state whether or not he would comply with this Court's order, and I, I quite frankly think that the noncompliance or compliance, or compliance is what is at issue, not an intention to comply or not to comply, and the Court would suggest to you that the appropriate way to proceed is for you to advise this Court as to when this Committee wants to receive his testimony, and if it's now, this morning, this afternoon, tomorrow morning, next week, whenever it is, the Court will order him to testify, and if he fails to testify, he will be ordered promptly back to this Court to determine if, what sanctions would be appropriate.

If he testifies, which I hope he would do in compliance with the order of this Court, then there would be no need for him to come back.

MR. DAVIDSON: We had suggested -- that is in the normal course a perfectly appropriate way of proceeding. We had suggested an alternative process for this, this reason: The Committee has scattered. It has adopted a rule which would allow any member of the Committee to return to Washington to take Mr. Borders' testimony during the recess, and we can certainly make that arrangement and set a date.

But if it is Mr. Borders' clear intention not to testify, we would recommend that as was done in the Cammisano case, a slightly different way of going about it, if it can be determined whether the witness does intend -- of course, his actual compliance would be something that would be tested later -- then we would arrange for his testimony.

If he does not intend, then we, we think that the expeditious means of obtaining his testimony would be to proceed forthwith with a contempt portion of this matter.

THE COURT: I have some disagreement with that. Now I'm upholding the subpoena today, and I'm ordering him to testify, and I also will be ordering him that if he does not testify, he is to report to this Court immediately to show cause why he should not be held in contempt.

But I quite frankly have some problem with the ruling that suggests that he's going to be asked to testify following this, after the subpoena has been upheld, and I think that I would not only be more comfortable with that, I think that if indeed you don't have -- sometimes you have a quorum when only one senator is present.

Do you mean to say the Senate Committee is just not meeting, period, and it doesn't intend to meet until more than enough members are here to --

MR. DAVIDSON: It's only that Congress is in recess.

THE COURT: Yes.

MR. DAVIDSON: But it did adopt a rule before leaving that this Committee may hear his testimony with a quorum of one member during the recess, and if that's, if it's the Court's pleasure to proceed in that way, I will determine when we can arrange for that and notify the witness.

THE COURT: Mr. Borders, step forward with Mr. Rosien, please.

The Court is ordering you to testify in accordance with the subpoena issued when required to by the Committee, and this Court is going to be advised as to when that Committee will be sitting to receive your testimony, and you will be advised.

MR. BORDERS: Yes, sir.

THE COURT: In the event you should refuse -- the Court is not going to assume that you will.

MR. BORDERS: Yes, sir.

THE COURT: In the event you should refuse to testify, you are ordered back to this Court forthwith at the time that you refuse to testify to show cause why you should not be held in contempt.

MR. BORDERS: Yes, sir.

THE COURT: You would be in contempt of the Court's order. It's a direct order to testify. You have an obligation in the firm opinion and conviction of this Court to assist the Committee on a very important matter, and you've been fully afforded due process in your objection to the subpoena.

The Court's satisfied that you must comply not only with the subpoena, but with this Court's order, direct order for you to testify fully under the use of immunity granted to you by Judge Oberdorfer.

MR. BORDERS: Would you indulgence us for one moment?

THE COURT: Yes.

MR. BORDERS: Excuse me, your Honor.

(Discussion between counsel and defendant off the record.)

MR. ROSIER: The only, the only reservation that Mr. Borders has, the only request, not reservation, is that we be given sufficient notice of the hearing to allow Mr. Arrington, who is our co-counsel with regard to the Senate matters, to be present. He's in Atlanta, Georgia.

THE COURT: Well, Atlanta is not all that far in this day and age, but I don't know when the Senate -- is there any indication when you will know?

MR. DAVIDSON: I was just advised -- and let me try to confirm it through the course of today or tomorrow, that it may be possible to do this on Tuesday morning at 10:00 a.m.

THE COURT: Well, at least there's advance notice of that.

MR. BORDERS: Yes, sir.

THE COURT: But you can confirm that with the Court as well as with counsel.

MR. DAVIDSON: When we have the date, should we submit a written order?

THE COURT: No, but I want an order submitted reflecting the order of this Court this morning. Did you submit one with your --

MR. DAVIDSON: Yes, we did, but it was more along the lines that we had discussed.

THE COURT: Well, then I'll amend it and issue it today.

We are on an August schedule here, and a judge is available at all times. By a necessity of the Court's schedule, you will, just as you're coming before me now rather than Judge Oberdorfer, you would next week be coming before another judge, and so I advise you of that because of the schedule of the Court.

But the court, a judge is available both on an emergency basis after hours and on the weekend, and a judge is available, of course, here in court during the normal workday, albeit it's known as a motions judge assignment, and

I have it for this week only. All right.

MR. BORDERS: Thank you, your Honor.

MR. ROSIER: Thank you, Judge.

THE COURT: Thank you.

(Which were all the proceedings had at this time.)

CERTIFICATE OF THE REPORTER

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

8-17-89

Anneliese J. Thomson Date

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
AUG 17 1989
Clerk, U.S. District Court
District of Columbia

IMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST
JUDGE ALCEE L. HASTINGS,
Applicant,

v.

Misc. No. 89-129

WILLIAM A. BORDERS, JR.,
Respondent.

ORDER

Having considered the Senate Impeachment Trial Committee's application to enforce its subpoena of respondent William A. Borders Jr., as well as Mr. Borders' opposition to the application, the Court finds that the Committee is entitled to enforce its subpoena and to receive Mr. Borders' testimony.

Therefore, it is ORDERED that Mr. Borders shall appear before the Impeachment Trial Committee at times to be designated by the Committee and shall respond forthwith to the questions propounded by the Committee and the parties, and shall testify fully and completely regarding his knowledge of all events relevant to the Senate's trial of the articles of impeachment against Judge Hastings.

It is FURTHER ORDERED that if Mr. Borders fails to appear before the Committee or fails to answer the questions propounded to him, he shall appear forthwith before the Court to show cause why he should not be held in contempt of this Court and why civil sanctions should not be imposed to compel obedience to this Court's Order.

8/17/89
DATE

GEORGE H. REVERCOMB
U.S. DISTRICT JUDGE

Michael Davidson
Ken U. Benjamin
Morgan J. Frankel
642 Hart Senate Office Bldg.
Washington, D.C. 20510

Michael S. Rosier
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS, Applicant, v. WILLIAM A. BORDERS, JR., Respondent.	Misc. No. 89-129 (LFO)

MOTION FOR ORDER ADJUDGING WILLIAM A. BORDERS, JR. IN CIVIL CONTEMPT AND IMPOSING SANCTIONS

The Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings (the "Committee") moves, pursuant to 28 U.S.C. § 1365 (Supp. V 1987), for an order of this Court adjudging William A. Borders, Jr., to be in contempt of this Court's order of August 17, 1989, and imposing civil sanctions to compel obedience to this Court's order. In support of the motion, the Committee shows the following:

1. On August 17, 1989, this Court ordered Mr. Borders, pursuant to 28 U.S.C. § 1365 (Supp. V 1987), to appear before the Committee at times to be designated by it and to testify fully about his knowledge of all events relevant to the Senate's trial of the articles of impeachment against Judge Hastings. This Court ordered further that, if Mr. Borders fails to answer the questions propounded to him, he should appear forthwith before this Court to show cause why he should not be held in contempt of this Court and why civil sanctions

should not be imposed to compel obedience to this Court's order. A copy of this Court's order of August 17, 1989 is attached as Exhibit A to this motion.

2. Pursuant to the Committee's direction, Mr. Borders appeared before the Committee today, August 22, 1989, at a hearing at which the Vice Chairman of the Committee, Senator Arlen Specter presided, but Mr. Borders refused to answer any questions about his knowledge of events relevant to the articles of impeachment against Judge Hastings. One of the House Managers, Representative Gekas, and counsel for both the House Managers and Judge Hastings, also were present to examine Mr. Borders.

3. At today's hearing, Mr. Borders restated the objections to testifying that had been overruled by the Committee on July 24 and 27, 1989, and by this Court on August 17, 1989. In addition, Mr. Borders objected that a quorum of the Committee was not present. For the reasons described in paragraphs 4-6 below, the Chair determined that a quorum was present and overruled Mr. Borders' objection.

4. Under Rule 26.7(a)(2) of the Standing Rules of the Senate, each committee of the Senate "is authorized to fix a lesser number than one-third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony." A copy of Standing Rule 26.7(a)(1) and (2) is attached as Exhibit B to this motion. This quorum rule is adopted pursuant to the constitutional "power [of each House of

Congress] to define what tribunal is competent to exact testimony and the conditions that establish its competency to do so." Christoffel v. United States, 338 U.S. 84, 89 (1949).

5. Twelve members of the Committee were present to hear Mr. Borders' testimony on July 24 and 27, 1989. To assure that there would be no hiatus in the Committee's ability to hear his testimony during the present recess of the Senate, the Committee, under the authority of Senate Standing Rule 26.7(a)(2), adopted the following rule:

> RULE 3 - QUORUM FOR TAKING TESTIMONY
> OF WILLIAM A. BORDERS, JR., DURING RECESS
>
> During the recess or adjournment of the Senate one member of the Committee shall constitute a quorum for the purpose of examination of Mr. William A. Borders, Jr., at which sworn testimony is heard and evidence taken.

135 Cong. Rec. S10013 (daily ed. Aug. 3, 1989)(Exhibit C to this motion).

6. The Committee's quorum rule was adopted for the benefit of both Mr. Borders and the Committee. It was intended to assure that the Committee would have a means of receiving Mr. Borders' testimony promptly for inclusion in the report that the Committee will be filing with the Senate. It was also intended to assure, if Mr. Borders is incarcerated for refusing to obey this Court's order, that there will be a ready means of enabling him to purge himself of the contempt during the recess of the Congress. In accordance with Rule 26.2 of the Standing Rules of the Senate, the Committee's rule was published in the Congressional Record. See United States v. Reinecke, 524 F.2d

435 (D.C. Cir. 1975) (adherence to publication rule required to assure legitimacy of one-member quorum for perjury prosecution).

7. In accordance with 28 U.S.C. § 1365, "[a]ny refusal or failure to obey a lawful order of the district court issued pursuant to [this statute on the civil enforcement of Senate subpoenas] may be held by such court to be a contempt thereof." The contempt phase of this subpoena enforcement proceeding has been commenced pursuant to this Court's order of August 17, 1989, that Mr. Borders appear forthwith before this Court and show cause why he should not be held in contempt if he refuses to testify. The statute provides that "[s]uch contempt proceeding shall be tried by the court and shall be summary in manner."

8. The legislative history of the civil enforcement statute makes clear that a witness who has disobeyed an order to testify "may not [in a contempt proceeding] challenge the validity of the initial order disobeyance of which led to the contempt proceeding." S. Rep. No. 170, 95th Cong., 1st Sess. 94 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 4216, 4310.

9. The civil enforcement statute provides that "[t]he purpose of sanctions imposed as a result of such contempt proceeding shall be to compel obedience to the order of the court." 28 U.S.C. § 1365(b).

10. The Senate has provided, through Senate Resolution 162 of the 101st Congress, that "[u]ntil the final disposition by the Senate of the Articles of Impeachment against Judge Alcee L.

Hastings, the Impeachment Trial Committee is authorized to continue this action to enforce the Committee's subpoena to William A. Borders, Jr., to hear his testimony, [and] to report that testimony to the Senate...."

WHEREFORE, the Committee respectfully moves that this Court (1) adjudge William A. Borders, Jr., to be in civil contempt of this Court's order of August 17, 1989, for refusing to answer the Committee's questions about his knowledge of events relevant to the Senate's trial of the articles of impeachment against Judge Hastings, and (2) commit Mr. Borders to the custody of the United States Marshal to be confined in a suitable place until he will comply with this Court's order of August 17, 1989, or until the Senate takes final action on the articles of impeachment against Judge Hastings, whichever occurs first.

Respectfully submitted,

Michael Davidson

Michael Davidson
Senate Legal Counsel

Ken U. Benjamin, Jr.
Deputy Senate Legal Counsel

Morgan J. Frankel
Assistant Senate Legal Counsel

642 Hart Senate Office Building
Washington, D.C. 20510

Counsel for Senate Impeachment
Trial Committee on Articles Against
Judge Alcee L. Hastings

Dated: August 22, 1989

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
AUG 22 1989
Clerk, U.S. District Court
District of Columbia

IMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST
JUDGE ALCEE L. HASTINGS,

Applicant,

v.

WILLIAM A. BORDERS, JR.,

Respondent.

Misc. No. 89-129 (LFO)

ORDER

William A. Borders, Jr., having been ordered by this Court on August 17, 1989, (1) to appear before the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings and to testify fully regarding his knowledge of all events relevant to the Senate's trial of the articles of impeachment against Judge Hastings, and (2) if he fails to testify, to appear forthwith before this Court to show cause why he should not be held in contempt of this Court and why civil sanctions should not be imposed to compel obedience to this Court's order, it is, on consideration of the motion of the Committee for an order adjudging Mr. Borders in civil contempt and imposing sanctions to compel obedience for having refused, at a hearing of the Committee on August 22, 1989, to obey this Court's order to testify, and Mr. Borders' response in open Court, this 22nd day of August, 1989, ORDERED that William A. Borders, Jr., is adjudged to be in civil contempt of this Court's order of August 17, 1989, for refusing to answer the Committee's and parties' questions about his knowledge of events relevant to the Senate's trial of the articles of impeachment against Judge Hastings, and

It is FURTHER ORDERED that William A. Borders, Jr., is committed, pursuant to 28 U.S.C. § 1365 (Supp. V 1987), to the custody of the United States Marshal to be confined in a suitable place until he will comply fully with this Court's order of August 17, 1989, or until the Senate takes final action on the articles of impeachment Against Judge Alcee L. Hastings, whichever occurs first, and

It is FURTHER ORDERED, at the request of Mr. Borders and with the consent of the Committee, that execution of this order of commitment be deferred until 10:a.m., August 25, 1989, and that Mr. Borders is directed to surrender himself by that time to the United States Marshal pursuant to directions that shall be given to him by the Marshal, and that the Marshal is directed to assume custody of Mr. Borders pursuant to this order on August 25, 1989.

United States District Judge

United [illegible] Court
for the [illegible]
A [illegible]
JAMES F. [illegible]
By
Deputy Clerk

RECEIVED OCT 1 7 1989

United States District Court for the District of Columbia

RECEIVED 1 7 1989

IMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST
JUDGE ALCEE L. HASTINGS
APPLICANT

vs.

WILLIAM A BORDERS, JR
RESPONDENT

MISC. NO. 89-129

FILED OCT 1 3 1989
JAMES F. DAVEY
CLERK

NOTICE OF APPEAL

Notice is hereby given this day of , 19 , that

William A. Borders, Jr.

hereby appeals to the United States Court of Appeals for the District of Columbia from the Order of this Court entered on the 22nd day of August, 1989 in favor of The United States Senate against said William A. Borders, Jr. for Civil contempt of the Court's Order of August 17, 1989.

Attorney for

WILLIAM A BORDERS, JR.

CLERK: Please mail copies of the above Notice of Appeal to the following at the addresses indicated:

Michael Davidson, Esq. Senate Legal Counsel 642 Hart Building Washington, DC 20510	Michael S. Rosier, Esq. 1420 K Street, N.W. Suite 711 Washington, DC 20005

[redacted]
OCT 20 11 28 AM '89
JAMES F. DAVEY, CLERK
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST
JUDGE ALCEE L. HASTINGS,

Applicant,

v.

WILLIAM A. BORDERS, JR.,

Respondent.

Misc. No. 89-129 (LFO)

MOTION OF SENATE IMPEACHMENT TRIAL COMMITTEE TO TERMINATE CIVIL CONTEMPT SANCTIONS AGAINST WILLIAM A. BORDERS, JR.

The Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings hereby moves to terminate the civil contempt sanctions imposed upon William A. Borders, Jr., by this Court's order of August 22, 1989. On August 22, the Court adjudged Mr. Borders in civil contempt of the Court's order of August 17, 1989 for Mr. Borders' refusal to testify before the Impeachment Trial Committee about his knowledge of events relevant to the Senate's trial of the impeachment of Judge Hastings. Pursuant to 28 U.S.C. § 1365 (Supp. V 1987), the Court ordered Mr. Borders committed to the custody of the United States Marshal "to be confined in a suitable place until he will comply fully with this Court's order of August 17, 1989, or until the Senate takes final action on the articles of impeachment Against Judge Alcee L. Hastings, whichever occurs first." Order of August 22, 1989, at 2.

Pursuant to the Court's order, Mr. Borders surrendered himself to the custody of the United States Marshal on August 25, 1989, and was incarcerated on that date. Since then, Mr. Borders has continued to refuse to comply with the Court's order that he testify regarding Judge Hastings' impeachment and has accordingly remained incarcerated under the Court's order.

The United States Senate voted today to convict Judge Hastings on the articles of impeachment. Accordingly, the Senate no longer seeks Mr. Borders' testimony, and in accord with the Court's order Mr. Borders' commitment should be terminated forthwith.

Wherefore, the Senate Impeachment Trial Committee respectfully moves that the Court order that the civil contempt sanctions against William A. Borders, Jr., be terminated, and that Mr. Borders be discharged from the custody of the United States Marshal.

A proposed order accompanies this motion.

Respectfully submitted,

Michael Davidson
Senate Legal Counsel

Ken U. Benjamin, Jr.
Deputy Senate Legal Counsel

Morg J Frankel

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Claire M. Sylvia
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Counsel for Senate Impeachment Trial Committee

Dated: October 20, 1989

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS, Applicant, v. WILLIAM A. BORDERS, JR., Respondent.	Misc. No. 89-129 (LFO)

FILED
OCT 20 1989
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

Upon consideration of the motion of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings to terminate civil contempt sanctions against William A. Borders, Jr., the Court's having ordered Mr. Borders incarcerated until he will comply fully with the Court's order that he testify before the Impeachment Trial Committee or until the Senate takes final action on the articles of impeachment against Judge Hastings, whichever occurs first, and the Senate's having notified the Court on October 20, 1989, that it has on that date taken final action on the articles of impeachment against Judge Hastings, it is this 20th day of October, 1989,

ORDERED That: the motion of the Senate Impeachment Trial Committee be and it is hereby granted, and it is

United States District Court
for the District of Columbia
A TRUE COPY
JAMES F. DAVEY, CLERK
By
Deputy Clerk

FURTHER ORDERED That: the civil contempt sanctions against William A. Borders, Jr., be, and they are hereby, terminated, and Mr. Borders be, and he is hereby, discharged from the custody of the United States Marshal, and it is

FURTHER ORDERED That: the Clerk shall serve a certified copy of this Order on the United States Marshal forthwith.

United States District Judge

To be served upon:

Michael Davidson
Senate Legal Counsel
Washington, D.C. 20510

Michael S. Rosier
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Suite 711
Washington, D.C. 20005